Supreme Court, U.S.
FILED

No. 01-738 MAY 18 2001

IN THE SUPREME COURT OF THE UNITED STATES

OFFICE OF THE CLERK

PHILLIP L. KING,

Petitioner,

v.

GENE STUBBLEFIELD,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 0-2177EMSL

Phillip King,	*	
	*	
Appellant,	*	
	*	Appeal from the United States
v.	*	District Court for the
	*	Eastern District of Missouri
Gene Stubblefield,	*	
	*	
Appellee.	*	

Before BOWMAN, HANSEN and MORRIS SHEPPARD ARNOLD, Circuit Judges

JUDGMENT

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

(5361-010199)

November 14, 2000

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

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APR -3 2000
U.S. DISTRICT COURT
EASTERN DISTRICT OF MO
ST. LOUIS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

PHILLIP KING,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 4:97-CV-748-CDP
	)	
GENE STUBBLEFIELD,	)	
	)	
Respondent.	)	

MEMORANDUM AND ORDER

This matter is before the Court upon the petition of Phillip King for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Following a review of his claims, the Court concludes that petitioner has failed to establish that he is entitled to relief and his petition for writ of habeas corpus will be denied.

I. Procedural Background

On April 6, 1990, a jury in the Circuit Court of the County of St. Louis, Missouri, found petitioner guilty of attempted forcible sodomy. On May 20, 1990, petitioner was sentenced as a persistent sexual offender to thirty years' imprisonment without possibility of probation or parole. Petitioner appealed his conviction and sentence

and filed a motion for postconviction relief pursuant to Missouri Supreme Court Rule 29.15, which was denied after an evidentiary hearing. In a consolidated appeal, the Missouri Court of Appeals affirmed his conviction and sentence, and the denial of postconviction relief.

In his amended petition, petitioner raises two claims for relief:

(1) That petitioner received ineffective assistance of trial counsel in that counsel:

(a) failed to interview and call as witnesses Paul and Jerry Pruett, and Stanley Bell; and

(b) failed to present evidence from Dr. Fox that petitioner was allegedly incapable of committing the charged offense and any evidence regarding that he wore a back brace; and

(2) That constitutional violations resulted in the conviction of one who is actually innocent causing a miscarriage of justice.[1]

In response, respondent concedes that petitioner has exhausted his available state remedies. In addition, respondent contends that petitioner's claim [*sic*] are without merit.

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[1]The Court notes that petitioner's amended petition originally contained three grounds for relief. The third ground was a claim of ineffective assistance of appellate counsel which was unexhausted. On February 24, 2000, this Court granted petitioner's request to voluntarily dismiss this claim.

II. Standard of Review

When reviewing a claim that has been determined on its merits in state court, a federal court cannot grant habeas relief on the claim unless the state court's adjudication of the claim—

> (i) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

III. Relevant Facts

The following facts are taken from the Missouri Court of Appeals' published opinion. See State v. King, 849 S.W.2d 706 (Mo. App. 1993). The victim, Kevin Moore, was a slightly built twenty year old with no prior criminal record who was charged with theft of fireworks and confined in the Jefferson County Jail in Hillsboro, Missouri. Late at night, the victim was requested by another inmate to go into cell-house four. Cell-house four was occupied by petitioner and several of his friends, who were all physically larger than the victim. Petitioner, with others, requested that the victim remove his jump suit. The victim declined four or five times. Finally, he was told that if he did not remove the jump suit, "they" would remove it for him. During this time the occupants of the cell were each striking their open palm of one hand with the fist of the other. The victim removed his jump suit and the occupants of the

cell discussed how "cute" the victim looked in his bikini underwear. Petitioner then told the victim to remove his underwear. Again the victim declined four or five times and was again told that unless he did so "they" would remove it for him. The victim testified that he eventually removed his underwear because he was afraid that the other inmates would beat him up if he did not. The petitioner then ordered the victim to lie face down on the lower bunk of the cell. Again he refused three or four times but eventually complied. As he was lying down, the victim observed all of the occupants of the cell except petitioner leave the cell and assume standing positions nearby. The victim then heard petitioner say that he was going to "fuck me in the ass". Within two or three minutes, the victim felt lotion being applied by four fingers to hfs buttocks and his anus. A guard then passed and the group dispersed. Some other inmates moved the victim to another cell.

Petitioner, still in the original cell, told the inmates in the other cell to make a dress out of a pillow case and put it on the victim and referred to the victim as his "girl". By this time, the inmates were locked down in their cells with petitioner and the victim in different cells. When the victim awoke in the morning, words had been written on his back and legs at locations where he could not have done the writing. These words included "Skip's baby", "Insert dick here" and "I love dick". Petitioner's nickname was Skip. The victim went to a guard and requested to be removed from the cellblock. The guard testified that when this request was made the victim was

hysterical, crying, and was the most terrified person the guard had ever seen.

IV. Grounds for Relief

a. Grounds 1 (a) and (b): ineffective assistance of counsel

In Grounds 1(a) and (b): petitioner contends that trial counsel was ineffective for not investigating and calling Paul and Jerry Pruett.

Petitioner contends that either Paul or Jerry Pruett or Stanley Bell would have provided petitioner with an alibi and that Dr. Fox would have testified that petitioner wore a back brace and was incapable of committing the offense. In addition, petitioner contends that counsel failed to enter any evidence that petitioner wore a back brace at the time of the crime.

To succeed on an ineffective assistance of counsel claim, petitioner must show that his attorney's performance was deficient and that the deficiency prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). Counsel has a duty to make a reasonable investigation based on the information provided by a defendant, particularly when an alibi is involved. Id. at 691.

In reviewing petitioner's ineffective assistance of counsel claims, the postconviction court made the following findings:

> Movant also asserts that Mr. Carlson failed to provide effective assistance of counsel by not interviewing or calling as witnesses Paul Pruett, Jerry Pruett, and Stanley Bell. Stanley Bell failed to appear at Petitioner's Motion hearing on December 5, 1991, therefore no

evidence having been offered as to the allegations relevant to Stanley Bell, the Court denies Petitioner's prayer for relief as to the Stanley Bell allegations and finds no ineffective assistance of counsel existed.

Movant's allegations of ineffective assistance of counsel for failure to interview and call as a witness Jerry Pruett are not well taken. Jerry Pruett testified on December 5, 1991 that, unlike the allegations contained in Petitioner's motion, he did not see any sexual act committed, saw no cream, and never saw Kevin Moore with his pants down. Jerry Pruett did not see David Coleman rub cream on the buttocks of Mr. Moore, and gave no relevant testimony as to that issue.

The Court also notes that Jerry Pruett has at least nine (9) prior convictions with at least seven (7) of those being felonies. Mr. Carlson testified that although he did not research the criminal history of Jerry Pruett, he was aware that he did have a criminal history. Jerry Pruett's credibility would have been lacking had Mr. Carlson called him as a witness, plus the door would have been open for the State to explore where the Movant and Jerry Pruett met on any occasion. Further, Mr. Carlson testified that his client had informed him that he met or knew Jerry Pruett from the Pacific Minimal Security Prison. On cross examination, the State would have been able to elicit this fact from the witness and the jury would have known that Movant had been in prison before and therefore was a prior offender.

The Court finds no ineffective assistance of counsel for not interviewing or calling Jerry

Pruett as a witness since Mr.. Carlson knew that he had a prior record, knew that the Jury would be informed as to the Movant's prior prison sentence, and because Jerry Pruett's testimony would not have been that he saw David Coleman rub cream on the victim's buttocks as alleged in Movant's petition.

Movant alleged that Mr. Carlson should have also interviewed and called as a witness Paul Pruett. Paul Pruett did testify at Movant's motion hearing on December 5, 1991, but he did not testify as alleged he would in Movant's petition. The testimony of December 5, 1991 was that he only saw David Coleman with a tube of lotion/cream, but never saw David Coleman rub the lotion/cream on Mr. Moore's buttocks. Mr. Carlson again testified that he knew that Paul Pruett also had a criminal record. In fact, Paul Pruett testified that he had three (3) convictions, two of which were felonies including Robbery in the Second Degree.

Paul Pruett's credibility would have been lacking, as it was during his testimony on December 5, 1991 and the State would again have been able to elicit the testimony that he and Movant had once met at Pacific Minimal Security Prison, therefore again informing the Jury that Movant was a prior offender. Mr. Carlson testified that he did call Paul Pruett while he was in the Pacific Prison, but he could not remember the conversation.

Paul Pruett's testimony of December 5, 1991 was not credible. He changed his testimony. He testified that he and Coleman were in cell 4 and Moore was in cell 3, and then that Moore

was in cell 3 and Coleman was in cell 3, and then that Moore and Coleman were not in the same cell after lockdown.

Further, he testified that he saw no-one rub lotion on Mr. Moore and that he saw Mr. Moore and Coleman in cell 3 prior to lockdown, but walked away and saw nothing after that. No ineffective assistance of counsel existed when Mr. Carlson failed to call Paul Pruett.

Movant further alleges that Mr. Carlson failed to provide effective assistance of counsel by failing to call Dr. Fox as a witness. The Court notes that Dr. Fox was subpoenaed to testify on December 5, 1991, but failed to appear and further that counsel for Movant declined a body attachment. We therefore have only Mr. Carlson's testimony as to why he did not call Dr. Fox.

Mr. Carlson testified, and the record in CR188-1080-FX(J1) confirms, that the jury was made aware that Movant did have a back brace. He further testified that his file might contain Movant's medical records. The Court considers the relevancy of the testimony of Dr. Fox had he testified. The record is clear from the trial and at the hearing on December 5, 1991, that Movant could walk and could move his arms and fingers. Whether or not he could have an erection is irrelevant and immaterial to the charge of attempted sodomy.

The Movant was charged with rubbing cream on the buttocks and anus of Mr. Moore, not with touching Mr. Moore's buttocks or anus with his erect penis. Section 566.060 and

566.010 RSMo do not require the touching of an erect penis, plus this was an attempt not the actual act of Sodomy.

The testimony of Dr. Fox would presumably be that Movant could not or would have had difficulty acquiring an erection. His testimony presumably would never have been that Movant couldn't walk, or use his arms and fingers. The touching of a non-erect penis to the mouth, tongue, hand or anus is deviate sexual intercourse and rubbing cream on the buttocks is a substantial step in the commission of sodomy. The Court finds no ineffective assistance of counsel for failure to call Dr. Fox as a witness. Just because the Movant had a removable back brace and a broken back, in no way negates the substantial step alleged in the criminal case.

* * *

Movant further asserts that Mr. Carlson should have had the Movant wear his back brace and walk for the jury. In support thereof, Movant cites State v. Walls, 637 S.W. 2d 812 (Mo. App. 1982). Again, Movant's case is not on point. A defendant can be ordered to expose his body, walk, talk, move, wear and model clothing but only if the issue of Identity is the subject matter of such order. The cases on this issue are many, but in each case it is the State or Federal Government, not the defendant, which requests the order and in all the cases, the sole issue is Identification.

In State v. Mitchell, 755 S.W.2d 603 (Mo. App. 1988), the Eastern District Court of Appeals held that uttering words to a jury does

not incriminate a defendant and is not privileged. The State requested the defendant be ordered to speak and the reason was for identification.

In State v. Nones, 577 S.W.2d 941 (Mo. App. 1979), the Southern District Court of Appeals ruled that the Fifth Amendment only extends to testimonial not demonstrative evidence. Again, the issue was identification.

In State v. Proctor, 535 S.W. 2d 141 (Mo. App. 1976), the Eastern District Court of Appeals ruled that the State could compel a defendant to walk to show a limp for only identification of physical characteristics and such was outside any Fifth Amendment protection.

In Holt v. United States of America, 54 L. Ed 1021 (1910), Justice Holmes wrote that the Fifth Amendment only extends to communications, but not to evidence obtained from exhibiting the person. Again identity was the issue here.

Likewise, in United States of America v. Wade, 18 L.Ed 2d 1149 (1967), the United States Supreme Court held that compelling a person to exhibit himself was not compulsion and that the Fifth Amendment only attaches to testimony on communication. Again, the issue was identification.

The Movant asserts that Mr. Carlson should have had him put on the back brace and walk or move for the jury. The issue to have been decided by said action would have been immobility or restrained mobility and not identity. Had Movant done so, he would have

been communicating, testifying, and certainly would have been subject to cross-examination by the State. The State would have been able to impeach the Movant with his prior Rape conviction, since the Movant would have waived any Fifth Amendment privilege.

It is a tactical decision whether or not to have a defendant testify. Mr. Carlson's decision not to allow testimony by having his client put on the back brace and move for the jury certainly did not amount to any ineffective assistance of counsel. Not revealing the Movant's prior Rape conviction is certainly an effective trial tactic.

Based upon the foregoing the Court finds and concludes that no ineffective assistance of counsel exists or occurred. Mr. Carlson did not make errors so serious that he was not functioning as the counsel guaranteed the defendant by the Sixth Amendment, the Movant was not prejudiced by any alleged deficient performance, and the Movant has failed to show that counsel's representation fell below an objective standard of reasonableness, Strickland v. Washington, 104 S. Ct. 2052 (1984). Based upon all the evidence before this Court, there has been no showing that the outcome of the case would have been any different. Failure to call three non-creditable felons and a doctor who's testimony would not have negated the charge, together with failure to have the Movant testify and thereby expose his prior Rape conviction, object on a moot issue and object to proper persistent sexual offender procedure does not rise to ineffective assistance of counsel under any theory of law.

The Missouri Court of Appeals found no error in the postconviction court's denial of petitioner's claims.

This Court presumes that the state court's findings of fact are correct if reliably and specifically made and set forth in writing after a full and fair hearing. Sanders v. Trickey, 875 F.2d 205, 208 (8th Cir. 1989). A state court's finding that counsel rendered effective assistance, however, is not a finding of fact but a mixed question of law and fact reviewable de novo. Strickland, 466 U.S. at 698. The underlying findings of fact, however, are entitled to the presumption of correctness. Id.

In reviewing petitioner's ineffective assistance of counsel claims, both the postconviction court and appellate court found that neither Jerry nor Paul Pruett would have testified at trial that petitioner did not attempt to sodomize the victim but only that neither saw defendant do so.[2] And, these witnesses were cell mates of the defendant and counsel believed that they had previously served prison time together. Both witnesses had extensive criminal records. Given these facts, the Court does not find that trial counsel's performance in failing to call Jerry and Paul Pruett was deficient.

Similarly, petitioner's claims that counsel was ineffective for failing to call Dr. Fox to testify

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[2]Because Stanley Bell did not testify at petitioner's postconviction hearing, petitioner has defaulted on developing the factual basis of his claim regarding this witness's testimony. See Keeny [sic] v. Tamayo-Reyes, 504 U.S. 1 (1992).

about petitioner's medical condition and introduce the back brace into evidence are also without merit. Dr. Pox did not testify at the postconviction hearing nor did petitioner testify as to what Dr. Fox's testimony would have been. Because petitioner did not present the testimony of Dr. Fox at his postconviction hearing, he has defaulted on developing the factual basis for this claim. See Keeney v. Tamayo-Reyes, 504 U.S. 2 (l992). Regardless, the Court assumes, as did the state postconviction court, that Dr. Fox would have testified that petitioner had a broken back and wore a back brace and therefore could not have committed the crime. A review of the record indicates that the jury was aware that petitioner wore a back brace, but more importantly, the record also indicates that petitioner could walk and move his fingers and therefore could commit the act of attempted sodomy. As for introducing the back brace by having petitioner wear it, counsel's advice to petitioner not to testify is one of trial strategy. See Rogers-Bey v. Lane, 896 F.2d 279, 283 (7th Cir. 1990); Hollenbeck v. Estelle, 672 F.2d 451, 453 (5th Cir. 1982). Petitioner does not allege that this advice was unreasonable given his prior conviction for rape or that he was denied his right to testify on his behalf. The Court does not find that trial counsel was deficient for failing to call Dr. Fox or in failing to introduce the back trace into evidence.

Therefore, the Court finds that the Missouri Court of Appeals' affirmance of the postconviction court's denial of petitioner's ineffective assistance of ccunsel claims to be a reasonable application of Strickland in light of the facts.

b. Ground 2: actual innocence claim

In Ground 2, petitioner contends that he is actually innocent because he was convicted with the use of 'purchased, conflicting, (and inconsistent testimony by the victim. In his traverse, petitioner bases his actual innocence claim on counsel's ineffectiveness and the affidavit of an inmate who states that petitioner did not commit the crime.

Petitioner's actual innocence claim is without merit. This is not a case in which petitioner is attempting to use a claim of actual innocence to avoid a procedural bar in order to present other constitutional claims. See Schlup v. Delo, 513 U.S. 293 (1995). Rather, petitioner is making a free-standing claim of actual innocence which is not cognizable in habeas corpus. See Meadows v. Delo, 99 F.3d 280 (8th Cir. 1956). The Court has reviewed petitioner's properly exhausted ineffective assistance of counsel claims and find [*sic*] them to be without merit. Regarding the affidavit, even if the Court considered it to be newly discovered evidence, it would not state a ground for habeas relief. See Herrera v. Collins, 506 U.S. 390 (1993).[3]

Certificate of Appealability

Because the petitioner cannot make a substantial showing of a denial of a constitutional right, the court will not issue a certificate of appealability. See Cox v. Norris, 133 F.3d 565, 569

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[3]The Court notes that in all likelihood this claim is time-barred as it was not presented in petitioner's original petition which was due by April 24, 1997, and does not appear to relate back to the original petition. See United States v. Craycraft, 167 F.3d 451 (8th Cir. 1999).

(8th Cir. 1997), cert. denied, 119 S.Ct. 89 (1998) (substantial showing requires that "issues are debatable among reasonable jurists, a court could resolve the issue differently, or the issues deserve further proceedings.

IT IS HEREBY ORDERED that the amended petition of Phillip King writ of habeas corpus pursuant to 28 U.S.C. § 2254 [#8] is denied.

IT IS FURTHER ORDERED that the petitioner has not made a substantial showing of the denial of a constitutional right and this Court will not issue a certificate of appealability.

A separate judgment in accordance with this memorandum and order is entered this same date.

Dated this 3rd day of April, 2000.

/s/ Catherine D. Perry
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 0-2177EMSL

Phillip King,	*	
	*	
Appellant,	*	
	*	Order Denying Petition for
v.	*	Rehearing and for Rehearing
	*	En Banc
Gene Stubblefield,	*	
	*	
Appellee.	*	

The petition for rehearing en bane is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

December 20, 2000

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

PHILLIP KING,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 4:97-CV-748 CDP
	)	
GENE STUBBLEFIELD,	)	
	)	
Respondent.	)	

FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS

NOW, Phillip King, by his attorneys, Stephen E. Rothenberg and Rebecca S. Stith, and pursuant to 28 U.S.C. § 2254, submits the following first amended petition for writ of habeas corpus by a petitioner in state custody:

I. PROCEDURAL AND FACTUAL BACKGROUND

A. Trial

Phillip King, Petitioner, was an inmate in the Jefferson County Jail, Hillsboro, Missouri in June, 1988. Several weeks before he was confined, Petitioner had been in a serious car accident in which his 10th and 12th vertabraes were fractured.

Following a three day hospital stay, Petitioner was required to wear a back brace which wrapped around his chest and stomach, reaching from the

top of his sternum to his lower abdomen, thereby greatly restricting his mobility. Dr. Thomas Fox, OF St. Louis, Missouri, treated Petitioner.[1] On or about June 24, 1968, Kevin Moore, the alleged victim in this case, was brought into the jail. Petitioner and Moore were both inmates in "A tank," an enclosed cellblock consisting of a common area and four cells. Each cell had bunk beds for four inmates. Moore was being held on a felony stealing charge. At the time of the incident in question, there were 13 inmates in "A tank."

On June 25, 1988, some time between 9:30 p.m. and 11:00 p.m., Kevin Moore was accosted by a number of inmates in cell 4. Petitioner was not in cell 4 at that time hut was in the common area with other inmates, including Paul Pruett, Jerry Pruett, and Stanley Bell. Petitioner and the other inmates in the common area were called over to cell 4 by Dixie Godfrey, an inmate assigned to cell 4. David Coleman was inside cell 4 with Kevin Moore, who was in his underwear. Shortly after the inmates from the common area, including Petitioner, had congregated outside cell 4, they dispersed into the common area. Petitioner then saw Kevin Moore go to the shower area. While Moore was in the shower, Godfrey, Coleman, and Paul Pruett, the inmates of cell 4, told the others they did not want Moore to remain in cell 4. That night, Petitioner, who had been in cell 3, switched cells with Moore.

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[1]Jefferson County officials were well aware of Mr. King's injuries, as they were required to take him to the hospital for X-rays on at least one occasion. See Exhibit A, copy of Prisoner Movement Record, attached hereto.

Moore waited until the next morning to make a complaint that a number of inmates had told him to take his clothes off and lie down on a bunk in cell 4. Moore claimed that, after he lay down on the bunk, one of the cell 4 inmates rubbed lotion on his buttocks. Shortly after Moore made the complaint, a guard, Charles Bennett, interviewed Moore about this incident and had Moore prepare a written statement. Moore did not name any of the inmates who had accosted him (given him a "hard time") despite being shown pictures of the inmates by the guard to whom he made his report.[2]

As a result of Moore's complaint, Petitioner was charged with attempted forcible sodomy. Petitioner was prosecuted despite Moore's admissions at the preliminary hearing,[3] at his deposition, and at trial that he did not see the person who put lotion on him.[4] (Appendix

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[2]See Exhibit B, copy of Report prepared by Deputy Charles Bennett and accompanying written statement of Kevin Moore. According to the guard's report, Moore was not shown a picture of David Coleman. No reason is given for omitting Coleman's picture. Coleman's physical build, mustache, and hair color are similar to Petitioner's. The guard's report indicates that David Coleman's picture was not shown to Moore, while the inmate roster shows that Coleman was confined in Cell Block A when the incident occurred. The Inmate Roster is attached hereto as Exhibit C.

[3]During the remainder of 1988, Kevin Moore refused to appear on two occasions for preliminary hearings. As a result, the prosecutor dismissed the charge against Mr. King, then secured Moore's cooperation and refiled the charge.

[4]Petitioner's Appendix is 2 volumes, I-II, is indexed and with consecutive page numbers on the lower right corner of each page, from one volume to the next.

("App.") at 21 (preliminary hearing); 83, 88 (Moore depo.); 136 (trial transcript)) Moore merely believed that Petitioner had rubbed the lotion on him because he could not see Petitioner at the time of the incident (App. 91 (moore depo.)) and he believed that the "high-pitched" voice, which he heard just a few minutes before the lotion was rubbed on him, belonged to Petitioner. (App. at 87 (Moore depo)) However, Moore admitted at trial that he did not know why he had said at his deposition that Petitioner was the one who rubbed the cream on him. (App. 316 (trial transcript)) Moore also admitted that he had not spoken with Petitioner the evening of the incident. Moore further acknowledged that the prosecutor promised that the felony stealing charge pending against him would be dropped if he cooperated in prosecuting the Petitioner. (App. at 280 (trial transcript p. 142))

After the lotion incident occurred, while Moore slept in cell 3, one or more of the other three inmates in cell 3 used a marker to write various words, including Phillip King's name, on Moore' s back and legs. Just as Petitioner could not have rubbed the lotion on Moore because he was never in cell 4 at the same time as Moore, he also could not have written these words on Moore because he did not sleep in Cell 3 at the same time as cannot move freely in the common area or between cells. No one ever claimed that Petitioner

was connected to this second, name-writing incident.[5]

Petitioner hired Frank Carlson to represent him. Despite being informed that at least a half dozen inmates had seen all or part of the lotion incident, including the other inmates in cell 4 and the inmates who came over from the common area, Carlson failed to interview all of these witnesses, any of whom could have placed Petitioner outside cell 4 at the time of the lotion incident.[6] Carlson failed to interview these other

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[5]Paul Pruett, prior to Petitioner's Rule 29.15 hearing, stated to an investigator for the public defender's office that Kenny McFadden and Eric Von Gruben, two other inmates in "A tank," were giving Moore a hard tine, making Moore say things about the about the other inmates. When asked why King's name was written on Moore, Pruett replied that it was "a joke [because his] name [King's] [was] used more than anyone else's." See Exhibit D, Memorandum of Interview, attached hereto and incorporated herein. Pruett also stated that "Dave Coleman smeared the grease on his [Moore's] butt . . . playing with him [Moore], scarring (sic) him." Exhibit D, Memorandum of Interview, p.2.

[6]Petitioner was represented in Missouri courts by the following attorneys:

Mr. Richard Wiffen, an associate attorney who worked for Mr. Frank Carlson, represented Petitioner at his preliminary hearing;
Mr. Frank Carlson, Attorney at Law—represented Petitioner through post-trial motions in the Circuit Court of Jefferson County;
Ms. Lisa Preddy Crane, Assistant State Appellate Public Defender—represented Petitioner at the evidentiary hearing held on his Rule 29.15 motion; and
Mr. Dennis Myers, Attorney at Law, represented Petitioner in the consolidated appeal from the denial of his Rule 29.15 motion and direct appeal.

inmates despite Moore's admissions at the preliminary hearing and in his deposition that a number of people were in the cell when the incident occurred, that "things went to a blur" when he was lying face-down on the bed, and that he could not actually see who put cream on him. (App. at 8, 13, 21 (preliminary hearing); App. at 85 (Moore depo.)) Carlson did not even present evidence from other witnesses that Petitioner's voice is moderately low and not at all high-pitched as Moore stated the perpetrator's voice was.

At trial, the state produced no evidence linking Petitioner in any way to the lotion incident except Moore's "belief" that Petitioner rubbed the lotion on him (in part based on Petitioner's *absence* from cell 4) and a high-pitched voice that could not have belonged to Petitioner. Several of the witnesses described above, none of whom Carlson questioned or used as witnesses, would have testified that Petitioner was in the common area and outside of cell 4 at the time of the lotion incident, that Coleman was in cell 4 when the incident occurred, that Petitioner does not have a high-pitched voice, and that Petitioner was wearing a back brace that severely hampered his movements.

Carlson further failed to investigate possible prosecutorial misconduct. Not long before trial, Richard Whiffen, an associate attorney of Carlson, wrote Petitioner that the prosecutor admitted in casual conversation that he was pushing the attempted forcible sodomy case against Petitioner because the previous, unrelated charge against

Petitioner had been dismissed.[7] Despite this admission by the State of bias and an improper motive in prosecuting Petitioner, Carlson did nothing with this information either to defend Petitioner or to have the case dismissed.

Phillip King was convicted of attempted forcible sodomy and sentenced to 30 years without parole following a three-day jury trial.

B. The 29.15 Hearing

1. Carlson's testimony at 29.15 evidentiary hearing

In Petitioner's Rule 29.15 post-conviction relief hearing, his trial attorney, Frank Carlson, claimed that he interviewed Petitioner at least six times before trial and admitted that Petitioner had given him the names of witnesses that "were in the same area of the jail as he during the time of the events that were charged against him, and that they would testify that he did not sexually assault or attempt to sodomize Kevin Moore." (App. 684-685 (29.15 hearing)). Paul Pruett and Jerry Pruett stated in Mr. King's 29.15 hearing that they would have been ready to testify on Petitioner's behalf at trial. (App. at 644, 666 (29.15 hearing)). Carlson admitted at the 29.15 hearing that he did not contact these individuals nor any other inmate-witnesses prior to trial, except for the complainant, Kevin Moore. (App. at 685, 695 (29.15 hearing)). Yet Petitioner gave Carlson a list of alibi witnesses from "A" Tank which included the Pruetts and another inmate, Stanley Bell.

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[7]Exhibit E, a copy of a letter to Petitioner from Richard Whiffen reviewing his conversation with the prosecutor, attached hereto.

Carlson testified that he did not contact these witnesses because he (incorrectly) assumed that "[t]heir acquaintanceship with Mr. King was from a prior prison term that Mr. King had served, and I didn't want to run the risk that would be put before the jury, and because they had been imprisoned I knew that they had records." (App. at 685 (29.15 hearing)).[8] Carlson, who never spoke to or investigated the criminakl records of any of these inmates (App. at 685, 699 (29.15 hearing)), just assumed that they would not be credible. Yet Carlson conceded that "there might have been at least one, possibly more of them who were simply in the jail not having known Phillip from prison." (App. at 699 (29.15 hearing)). He further conceded "that if they were called they would have testified, that Phillip had not done this, they had not seen him do what he was accused of." (App. at 686 (29.15 hearing)) Carlson lamely attempted to explain his failure to pursue these witnesses, stating, "I didn't think that a statement, 'I didn't see him do anything,' would be sufficient." (App. at 686 (29.15 hearing)).

Carlson also admitted that, while he knew that Petitioner had been seriously injured in a car accident several weeks before the incident in question, he failed even to contact Petitioner's doctor, or to present testimony on how severely

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[8]In fact, Petitioner was never incarcerated with any of the individuals in question, as verified by the Missouri Department of Corrections. See Letter from Department of Corrections, attached hereto and incorporated herein as Exhibit F. Mr. King told Carlson he had never been incarcerated with these inmate-witnesses.

Petitioner's back injuries and brace restricted his mobility. (App. at 688 (29.15 hearing))

2. Paul Pruett's testimony in the Rule 29.15 hearing

Paul Pruett was not subpoenaed or called to testify at the trial of Phillip King. (App. at 641 (29.15 hearing)). He was never even contacted by Carlson. (App. at 652 (29.15 hearing). Paul Pruett testified at the 29.15 hearing that some inmates other than Petitioner, including David Coleman, were "messing" with Kevin Moore. (App. at 638 (29.15 hearing)). Pruett testified that Coleman was the only person he saw with any kind of lotion or cream that night. (app. at 639 (29.15 hearing)). "He [Coleman] was setting on his bunk [in cell 4 and] next to the bunk from him is where the kid [Moore] was laying, and that's where he was setting with the lotion in his hand." (App. at 639 (29.15 hearing)). Kevin Moore was lying on a bunk with his pants down, in the same cell as Coleman, when Paul Pruett observed Coleman with a lotion bottle in his hand. (App. at 656-657 (29.15 T. hearing)) . Paul Pruett never saw Petitioner with any lotion or in the same cell as Kevin Moore after lock down. (App. at 653, 656 (29.15 hearing)). Paul Pruett was willing to testify to these facts at trial. (App. at 644 (29.15 hearing)). Paul Pruett had provided the same recollection of these events to an investigator working for the Public Defender's office in preparation for the 29.15 hearing. Exhibit D.

3. Jerry Pruett's testimony in the Rule 29.15 hearing

Jerry Pruett also was an inmate in "A" tank on June 24, 1988 whom Frank Carlson failed to

contact. (App. at 665 (29.15 hearing)). Jerry Pruett testified that some inmates, including Coleman, were harassing Moore just before the lotion incident. (App. at 661-662 (29.15 hearing)). When asked whether Petiitoner participated in the harassment, Jerry Pruett testified, "I never seen him [Phillip King] involved in it." (App. at 662 (29.15 hearing)). He further testified that he never saw Petitioner with any lotion or talking to Moore that night. (App. at 663 (29.15 hearing)). He would have testified to these facts at Phillip King's trial. (App. at 666 (29.15 hearing)).

Despite Carlson's admissions that he failed to pursue witnesses who would have provided Petitioner with an alibi and the exculpatory testimony of the Pruetts, the 29.15 court inexplicably concluded that his failure to call these other inmates to testify on behalf of Petitioner did not constitute ineffective assistance of counsel.

C. Consolidated Appeal

Following the denial of his Rule 29.15 motion, Petitioner's mother, Aloma Rackley, and her daughter retained Dennis Myers to handle the consolidated appeal of the denial of his Rule 29.15 motion and his direct appeal. Petitioner and his family members experienced ongoing and serious problems with Myers' appellate representation. Myers never met with Petitioner and only briefly spoke with him by telephone. Petitioner's family repeatedly called Myers to find out how the case was progressing, but Myers never returned their calls. Myers did not revise the Legal Files for the direct appeal and 29.15 appeal but relied on the record prepared by the appellate public defender who had the appeal briefly before Myers was retained. Myers failed to send a copy of the

opening appellate brief to Petitioner or his family so that they would know a brief had been filed, failed to file a reply brief, failed to request oral argument, and failed to seek transfer to the Supreme Court of Missouri when Petitioner lost his appeal.

In his sole brief, Myers merely restated some of the issues presented in Carlson's Motion for Judgement of Acquittal at the Close of all Evidence. He failed to argue, and thereby preserve, the issue of the prosecutor's misconduct in making improper comments to the jury regarding the defendant's failure both to testify and to present witnesses and evidence from the jail. (App. at 597 (Motion for Acquittal); App. at 869 (Appellant's Brief)) By his failure to provide even a modicum of the advocacy required of appellate counsel, Myers sorely prejudiced Petitioner's chances on appeal.

Even after Myers filed his brief, he did not provide information to Petitioner or his family. When Petitioner's family called to learn the status of the appeal, Myers' secretary merely told them that no opinion had been rendered. On May 3, 1993, Petitioner's family once again was told that no opinion had been rendered. Yet, on that same date, Petitioner's family learned by calling the court clerk's office that a decision had been handed down six weeks earlier, on March 23, 1993, affirming Petitioner's conviction. Petitioner and Petitioner's family then made numerous attempts to contact Myers to discuss the Court's decision as well as Myers' failure to seek review by the Supreme Court of Missouri, but Myers never returned the calls.

Petitioner's family submitted these complaints against Myers to the Missouri Bar. The Circuit Bar Committee for the Twenty-second Judicial Circuit filed a five count Information alleging that Dennis Myers violated various provisions of Supreme Court Rule 4. The Chief Dsiciplinary Counsel later filed an amended Information alleging additional violations.[9] On December 17, 1996, the Supreme Court of Missouri subsequently issued an order that Dennis Myers be publicly reprimanded for violations of Rule 4 on five counts. Myers has not practiced law since mid 1995 and he has reported to the Supreme Court that he has taken inactive status.

II. HISTORY OF PRIOR PROCEEDINGS

On February 22, 1989 Petitioner appeared for his preliminary hearing on the charge of attempted sodomy. Trial began on April 4, 1990 and ended on April 6, 1990.

Petitioner filed his 29.15 post-conviction relief on December 6, 1990 alleging, *inter alia,* ineffective assistance of trial counsel for failing to contact and call witnesses. Following an evidentiary hearing, the trial court denied Petitioner's 29.15 and Petitioner's appeal from the denial was consolidated with his direct appeal. The Missouri Court of Appeals, Eastern District, affirmed Petitioner's conviction and affirmed the denial of his 29.15 motion.

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[9]See Exhibit G, a copy of the Order entered by the Supreme Court of Missouri concerning Dennis Myer's public reprimand, attached hereto. Count II of the Order refers to Phillip King.

On April 22, 1997 Petitioner filed this petition for writ of habeas corpus.

III. PETITION'S CLAIMS FOR WRIT OF HABEAS CORPUS

Petitioner's convictions and sentences were obtained in violation of his rights guaranteed under the United States Constitution in the following respects:

CLAIM NO. 1

PETITIONER WAS DENIED DUE PROCESS OF LAW AND HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN THAT TRIAL COUNSEL FAILED TO INVESTIGATE AND PRESENT EXCULPATORY EVIDENCE OF ALIBI WITNESSES AND OTHER DEFENSE WITNESSES PROVIDED BY PETITIONER.

To prove ineffective assistance of counsel, one must show that his attorney's performance was deficient and such deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 104 5.Ct. 2052 (1984); Alexander v. Armontrout, 985 F.2d 978, 978 (8th Cir.), cert. denied, U.S. , 114 S.Ct. 224 (1993); Houston v. Lockhart, 982 F.2d 1246, 1250-1251 (8th Cir. 1993). "[A]t a minimum, counsel has the duty to interview. potential witnesses and to make an independent investigation of the facts and circumstances of the case." Nealy v. Cabana, 764 F.2d 1173, 1177 (5th Cir. 1985) (emphasis added). "Although we generally give great deference to an attorney's informed strategic choices, we closely scrutinize an attorney's preparatory activities." Id. (citing Chambers v. Armontrout, 907 F.2d 825, 831, 835 (8th Cir.) (en banc), cert. denied, 498 U.S.

950, 111 S.Ct. 369, 112 L.Ed.2d 331 (1990)). Thus, regardless what strategies an attorney may use at trial, failure to sufficiently prepare for trial violates the attorney's most basic duty to his client.

"Reasonable performance of counsel includes an adequate investigation of facts, consideration of viable theories, and development of evidence to support those theories. An attorney must make a reasonable investigation in preparing a case or make a reasonable decision not to conduct a particular investigation." Foster v. Lockhart, 9 F.3d 722, 726 (8th Cir. 1993) (citing Kenley v. Armontrout, 937 F.2d 1298, 1304 (8th Cir.), cert. denied, 112 S.Ct. 431 (1991)). "Before an attorney can make a reasonable strategic choice against pursuing a certain line of investigation, the attorney must obtain the facts needed to make the decision." Id.

In this case, Petitioner's trial attorney wholly failed to conduct obvious and crucial alibi-witness interviews to the great prejudice of Petitioner at trial.

A. COUNSEL, RELYING ON HIS OWN INCORRECT ASSUMPTIONS, FAILED TO INTERVIEW AND CALL AS WITNESSES PAUL PRUETT, JERRY PRUETT AND STANLEY BELL SOME OR ALL OF WHOM WOULD HAVE PROVIDED AN ALIBI FOR PETITIONER.

In the present case, Mr. King was denied effective assistance of counsel at trial because his trial counsel, Carlson, failed to investigate, interview or call witnesses who would have testified on behalf of Petitioner. Specifically,

Carlson admitted he did not interview any of the other inmates present at the time of the incident involving Moore, even though names of the inmates were provided by Petitioner and the prosecuting attorney.

1. Carlson's failure to properly investigate and interview witnesses rendered his performance deficient.

Once the Petitioner provided his trial lawyer with the names of potential alibi witnesses, it was Carlson's duty to attempt to interview those witnesses. As a matter of law, Carlson violated such duty when he admittedly failed to make an~ any effort to call such witnesses to aid Petitioner's alibi defense. Lawrence v. Armontrout, 900 F.2d 127, 129 (8th Cir. 1990). An admission by the trial lawyer that he failed to attempt to interview potential alibi witnesses renders the lawyer's conduct "short of the diligence that a reasonably competent attorney would exercise under similar circumstances," and such conduct constitutes ineffective assistance of counsel. Id.

2. Carlson's failure to present exculpatory evidence fatally prejudiced Petitioner's case and rendered the result inherently unreliable.

"In order to prevail on a claim of ineffective assistance of counsel for failure to call a witness, movant must prove: (1) the witness could be located through reasonable investigation; (2) the witness would testify; and (3) the witness would provide a viable defense." State v. Hubert, 923 S.W.2d 434, 438 (Mo.App. E.D 1996) (citing Harry v. State, 800 S.W.2d 111, 115 (Mo.App. E.D. 1990). "[A] petitioner ordinarily must show not only that

the testimony of uncalled witnesses would have been favorable, but also that those witnesses would have testified at trial." Lawrence v. Armontrout, 900 F.2d at 130.

Petitioner meets all three prongs set forth above. Petitoner gave Carlson the names of potential alibi witnesses and their whereabouts. Two of his alibi witnesses, Paul Pruett and Jerry Pruett, testified at Petitioner's Rule 29.15 evidentiary hearing that Petitioner was not involved in the alleged act against Moore. The Pruetts also stated that they would have testified at Petitioner's trial. (App. at 644, 666 (29.15 hearing)) Thus, Carlson's failure to interview and call such alibi witnesses in support of Petitioner's defense plainly rendered the jury verdict unreliable and such verdict must be set aside. Lawrence, supra; Strickland, supra.

This Circuit has consistently held that failure to investigate potential alibi witnesses provided by the defendant constitutes ineffective assistance of counsel. Lawrence v. Armontrout, 900 F.2d at 129. Further, "[t]he decision to interview a potential witness is not a decision related to trial strategy. Rather, it is a decision related to adequate preparation for trial." Chambers v. Armontrout, 907 F.2d 825, 828 (8th Cir. 1990). Although these witnesses were easy to locate, Carlson did not even attempt to contact or interview them. (29.15 T. 92). In failing to contact these witnesses, Carlson failed to properly investigate potential exculpatory evidence. Such failure and breach of his minimum duty to provide a defense rendered Carlson unable to make an informed decision as to the witnesses' credibility and potential benefit to Petitioner's case. Such failing in Carlson's

minimal obligation to Petitioner cannot be characterized as "trial strategy" but a blatant deficiency which irreparably prejudiced Phillip King at trial.

Carlson's complete failure to contact any witnesses on behalf of Phillip King and his failure to investigate alibi witnesses did not constitute "reasonable professional judgment." Strickland, supra 466 U.S. at 690-91, 104 S.Ct. at 2065-66. By definition, it was unreasonable, deficient and highly prejudicial to Petitioner. Carlson's failure to investigate and interview potential alibi witnesses "prejudiced [Petitioner's] defense sufficiently to make it reasonably probable that it rendered the trial unfair and the result unreliable." Ward v. United States, 995 F.2d 1317, 1321 (6th Cir. 1993), citing Strickland, 104 S.C.t at 2064. "The essential question is whether better lawyering would have produced a different result." Ward, 995 F.2d at 1321.

Both Paul Pruett and Jerry Pruett were readily available, both for interview purposes and for testifying at trial. By failing to call a witness present at the time of the incident in question, who completely supported Petitioner's claim of innocence, and who saw someone else — not Petitioner — with lotion in the cell, Carlson fatally damaged Petitioner's defense. Given Moore's admissions that a number of inmates witnessed the incident, that he was face-down on the bunk when the incident occurred, and that he could not see to the side or behind him, it is highly probable that providing the jury with Paul Pruett's testimony would have produced an acquittal. Carlson's pretrial investigation and prepration for Petitioner's defense indisputably fell far short of

an adequate performance, rendering the verdict against Petitoner inherently unreliable.

B. COUNSEL FAILED TO OFFER EVIDENCE OF DR. THOMAS FOX THAT PETITIONER WAS REQUIRED TO WEAR A BACK BRACE FOLLOWING HIS INJURY, AND WAS INCAPABLE OF COMMITTING THE OFFENSE ALLEGED, WHICH EVIDENCE WAS READILY AVAILABLE TO HIM.

Approximately one and a half weeks prior to being confined, Petitioner had been in a car accident in which his back was broken in two places. Following a three day hospital stay, Petitioner was required to wear a back brace, worn around his chest and stomach, reaching from the top of his sternum to his lower abdomen, greatly restricting his mobility. Dr. Thomas Fox, a local physician, treated Phillip King. Petitioner asked Carlson to contact Dr. Fox but Carlson ignored this request and did not contact Dr. Fox. By such breach of his minimal obligation to investigate witnesses with potentially exculpatory evidence, Carlson failed to present strong evidence that, as a result of his injuries, Petitioner's mobility (including his ability to bend over) was severely hampered and he was incapable of committing the crime charged. Carlson admitted that he never even attempted to contact Dr. Fox and "did not ask anybody to testify about any medical opinion." (29.15 T. 81, 98).

As with the alibi witnesses, Carlson again breached his duty to prepare properly for trial and therefore could not make an informed strategic

choice. In failing to even contact Dr. Fox, Carlson did not exercise the ordinary skill and diligence of a competent attorney in the same situation. Carlson's inaction constituted ineffectiveness in trial perparation which prejudiced Phillip King's defense. Strickland, 466 U.S. at 690-91 (Courts must "closely scrutinize an attorney's preparatory activities") (citing Chambers, 907 F.2d at 831, 835 (8th Cir.) (en banc), cert. denied, 498 U.S. 950, 111 S.Ct. 369, 112 L.Ed.2d 331 (1990)

Nor did Carlson attempt to introduce into evidence the back brace worn by King or have Mr. King demonstrate wearing the brace at trial, either through Dr. Fox's testimony or by way of demonstrative evidence. Petitioner's back brace would have provided persuasive evidence of his physical limitations which rendered him unable to commit the crime charged or even to credibly threaten to do so. Despite the fact that Carlson had the back brace in his possession at the time of trial, he made no use whatsoever of this valuable, clearly exculpatory piece of evidence. (App. at 706 (29.15 hearing)).

Carlson testified that he did not allow Mr. King to demonstrate the back brace in court because that would have subjected Mr. King to cross examination by the prosecution. (App. at 707 (29.15 hearing)). However, Missouri courts regularly allow this type of demonstrative evidence without finding it to be a waiver of one's Fifth Amendment privilege. "[R]equiring the defendant to participate in a courtroom demonstration of a physical characteristic does not constitute the giving of testimony so far as the protection of the Fifth Amendment is concerned." State v. Morton, 684 S.W.2d 601, 607 (Mo.App.

1985). The state, itself, has not been reluctant to use a defendant for demonstrative purposes because no violation of the defendant's Fifth Amendment right occurs. See, e.g. State v. Walls, 637 S.W.2d 812 (Mo.App. 1982) (permissible to allow the defendant to wear certain clothing in the presence of the jury); State v. Owens, 620 S.W.2d 448 (Mo.App. 1981) (trial court did not err in granting the prosecutor's request that the court order the defendant to stand for the purpose of allowing a witness to inspect a tattoo on defendant's face); State v. Proctor, 535 S.W.2d 141 (Mo.App. 1976) (trial court did not err in compelling defendant to walk, in the presence of the jury, for the purpose of displaying a limp); State v. Morton, 684 S.W.2d 601, 606 (Mo.App. 1985).

Moreover, Carlson could have called the treating physician to identify and describe the back brace as the one prescribed in Petitioner's treatment. Carlson's admitted failures to speak with the Petitioner's treating physician and to introduce evidence of Petitioner's extraordinary physical limitations did not constitute use of the ordinary skill and diligence of a competent attorney in the same situation. Such failure further compromised Petitioner's already disabled defense.

The allegations of defense counsel's failure to confer, investigate witnesses, and otherwise properly prepare warrant an evidentiary hearing, and, if such allegations are true, "[petitioner] night have been denied counsel altogether." Lahay v. Armontrout, 923 F.2d 578, 579 (8th Cir. 1991). In the instant case, "there is a reasonable probability that, absent the errors, the factfinder would have

had a reasonable doubt respecting guilt." Strickland, 104 S.Ct. at 2064.

CLAIM NO. 2

PETITIONER WAS DENIED DUE PROCESS OF LAW AND EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IN THAT APPELLATE COUNSEL FAILED TO ADEQUATELY INVESTIGATE, PREPARE, AND BRIEF PETITIONER'S CONSOLIDATED APPEAL.

Due process requires effective assistance of counsel on a first appeal as of right. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985). "To establish ineffective assistance of appellate counsel, [Petitioner] must show that appellate counsel's performance fell below an objective standard of reasonablenss and that the deficient performance prejudiced his defense." Zinzer v. State, 60 F.3d 1296, 1299 (8th Cir. 1995) (citing Strickland, 466 U.S. at 687. Effective appellate advocacy requires an interested advocate who acquires a thorough understanding of the facts and issues of the case. Myron H. Bright, *Appellate Briefwriting: Some "Golden" Rules,* 17 Creighton L.Rev. 1069 (1984). In addition, appellate counsel should "recognize that for the appellant oral argument is crucial." Myron H. Bright, "How to Win an Appeal: The New Ten Commandments of Oral Argument," *Trial,* July 1996, at 68.

Further, in using the Strickland standard to examine ineffective assistance of counsel claims,[10] courts have regularly held that when a defendant alleges that his counsel behaved unethically or improperly, an evidentiary hearing is necessary. See, e.g. Friedman v. United States, 588 F.2d 1010, 1015 (5th Cir. 1979) (court obligated to delve behind the scenes of trial conduct where allegations of a appointed attorney demanding additional compensation are made); Lahay v. Armontrout, supra.

To determine effectiveness, a court cannot merely examine the value, if any, of appellate counsel's brief but must review plausible claims of improper conduct and inadequate preparation in the entire appellate process. Such a broad examination may raise sufficient doubt as to the true worth of the performance of appellate counsel. Cf. Friedman, 588 F.2d at 1016 (upon examining the attorney's conduct and trial preparation, the performance of the trial attorney was "not as effective as it might seem to third-party observers" and the attorney's alleged deficiencies mandated an evidentiary hearing on all claims which, if true, might support a constitutional claim of ineffective assistance of counsel).

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[10]Criminal defendants have a right to effective assistance of counsel at trial under the Sixth Amendment, as applied to the states through the Fourteenth Amendment. The right to effective assistance of state appellate counsel derives from the Fourteenth Amendment's due process guarantee. Evitts v. Lucey, supra. Both trial counsel and appellate counsel performance is reviewed under the Strickland standard.

Here, Petitioner's appellate counsel, Myers, performed so poorly for Petitioner that he was reprimanded by the Missouri Supreme Court. Although Myers did file an inadequate opening brief for Petitioner, he did nothing else. Myers' sole effort, a brief, merely mimicked some of the issues raised in Petitioner's post-trial motion for acquittal and the 29.15 motion prepared by Petitioner's public defender. The brief provided at best a cursory review of a case which plainly required close scrutiny from the Missouri Court of Appeals. Given the various inconsistent statements made by the complainant, Moore, and his admissions regarding the presence of various inmates at the time of the incident, it was crucial for appellate counsel to zealously advocate on behalf the Petitioner. Further, Myers' brief failed to include any reference to the guard's failure to show Coleman's picture to Moore for identification purposes on the morning after the incident and failed to raise as error the prosecutor's improper comments during closing argument. See e.g. State v. Thompson, 835 S.W.2d 394, 398-99 (Mo.Ct.App. 1992). His brief did not even contain a simple request for oral argument.

After filing this less-than-minimal brief, Myers apparently did nothing more than "wash his hands" of the matter. He did not file a reply brief. Oral argument was not presented. Myers never contacted Petitioner or Petitioner's family about the appellate court's decision[11], nor did Myers

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[11]In fact, Myers may have had his secretary affirmatively mislead Petitoner and his family because she incorrectly informed them that no decision had been handed down several weeks after the Opinion came out.

seek further review of the case in the Missouri Supreme Court, all of which he admitted in proceedings before the Missouri Supreme Court disciplinary committee.

Under these circumstances it is clear that Myers' efforts were perfunctory and that Petitioner could not have received the "reasonably effective assistance of a diligent and devoted advocate." Friedman v. United States, 588 F.2d 1010, 1016 (5th Cir. 1979).

Myers' failures doomed Petitioner's appeal. The effort evidenced by Myers in no way reflects the type of effort required under the Missouri Rule of Professional Conduct 1.3, which requires reasonable diligence in the representation of a client. Myers' failure to request oral argument and to file a reply brief did not constitute diligent and adequate representation on appeal where, as in this case, the lone brief he did file was so seriously deficient. Briefs take on added importance in non-oral argument appeals, making Myers' failure to file a reply brief that much more prejudicial. See Myron H. Bright, *Appellate Briefwriting: Some "Golden" Rules,* 17 Creighton L.Rev. 1069 (1984) (when oral argument will not be held, "[T]he briefs take on added importance as the parties' sole means of appearance before the court.") Just as oral argument "can and does make a difference," filing a thorough reply brief as a rebuttal of the state's arguments in a case submitted on the briefs gives the appellant one last chance to focus the attention of the court on the most important points on appeal. Myron H. Bright, "How to Succeed on Appeal: A View from the Bench," Trial, November 1991, at 71.

Myers failed to provide effective appellate representation. His failure to preserve issues, as mentioned above, to file a reply brief, and to request oral argument effectively amounted to Myers' abandoning Petitioner at a most crucial point in the appellate process. Cf. Sanders v. State, 807 S.W.2d 493 (Mo.banc 1991) (at state court post-conviction motion level, counsel's failures caused by negligence can constitute "abandonment"). Myers' omissions, especially when viewed cumulatively, resulted in the "actual or constructive denial of the assistance of [appellate] counsel altogether"—all of which constitutes prejudice *per se*. See Lozada v. Deeds, 964 F.2d 956, 958-59 (9th Cir. 1992) (same reasoning). The prejudice caused to Petitioner by Myers' deficient performance cannot be overstated.

CLAIM NO. 3

PETITIONER'S CONVICTION CONSTITUTES A MISCARRIAGE OF JUSTICE IN THAT CONSTITUTIONAL VIOLATIONS RESULTED IN THE CONVICTION OF SOMEONE WHO IS ACTUALLY INNOCENT.

"An innocent man may be imprisoned. This we cannot chance." So wrote Judge Beam in Dumond v. Lockhart, 885 F.2d 419, 421 (8th Cir. 1989). The desire to avoid conviction of the innocent stands at the core of our criminal justice system. Schlup v. Delo, 115 S.Ct. 851, 866 (1995). It is a "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." Id. (quoting In re Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring)).

To satisfy the miscarriage standard, the habeas petitioner must show "that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." Schlup, 115 S.Ct. at 867. When evaluating a petitioner's actual innocence claim, the court is permitted to consider all of the evidence. "[T]he district court is not bound by the rules of admissibility that would govern at trial. Instead, the emphasis on 'actual innocence' allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable at trial." Schlup, 115 S.Ct. at 867. See also Barrington v. Norris, 49 F.3d 440, 441 (8th Cir. 1995); Battle v. Delo, 64 F3d 347, 352 (8th Cir. 1995) cert denied, Battle v. Bowersox, 1996 U.S. LEXIS 3651 (1996) (same).

The Petitioner was convicted with the use of purchased, conflicting, inconsistent testimony by a complaining witness, Moore, whose one consistent admission was that he could not see who put lotion on him and that he could see the legs of some of the other inmates when he was face down on the bunk. At no point did Moore ever complain that all the events he described, such as being verbally pressured to remove his clothing and lie face down on a bunk, were performed by Petitioner. Moore repeatedly testified that he was made to remove his clothing by a group of inmates but never singled out Petitioner. He did, however, identify Dixie Godfrey as the instigator of the incident (and a number of the other inmates saw at least some of the lotion incident). The only person ever identified as being in possession of any lotion was Dave Coleman, the one inmate whose picture was

not shown to Moore on the morning following the incident. The prosecution presented no evidence to corroborate the allegation that Petitioner engaged in the conduct for which he was convicted. Moore made it clear that he cooperated in order to please the prosecutor[12] so that his felony stealing charge would be dropped and that he wanted revenge for the humiliation he had endured.

Given this record, one cannot in good faith maintain that Petitioner's conviction is just but must, instead, acknowledge the real possibility of actual innocence. Once the 29.15 testimony of Petitioner's alibi witnesses is reviewed, the magnitude of the injustice grows. Paul Pruett testified it was Coleman, not Petitioner, who was in possession of the lotion and near Moore. Medical evidence would have established (and could not have been disputed by the prosecution) that Petitioner had suffered a back injury which required him to wear a brace and take medication. The Petitioner, given the difficulty he experienced when moving or bending, was not physically capable of intimidating or attempting to sodomize Moore in the confined space of a lower bunk in a small jail cell.

Petitioner has suffered a gross miscarriage of justice where, as here, there is evidence of his

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[12]Who had to dismiss the original charge because of Moore's refusal to appear at two previous hearings.

[13]The prosecution's withdrawal of its endorsement of Paul Pruett as a witness was made for the obvious reason that Pruett's testimony would have undermined the state's case. Yet Carlson still failed to put Pruett on the stand.

actual innocence. Had Carlson adequately attacked the prosecution's case[13] and presented the alibi and medical testimony for Petitioner, the jury could have returned a verdict of not guilty.

IV. CONCLUSION

Phillip King was denied his right to effective assistance of counsel in violation of the sixth and fourteenth amendments to the United States Constitution because counsel did not conduct a reasonable investigation of the law, facts and circumstances of the offense. Frank Carlson made no effort even to contact alibi witnesses or Petitioner's doctor. Thus, he did not make informed strategic choices as to whether to call them as witnesses. The failure of Petitioner's trial lawyer to investigate and interview key witnesses, all of whom would have testified at trial, "prejudiced [Petitioner's] defense sufficiently to make it reasonably probable that it rendered the trial unfair and the result unreliable." Ward v. United States, 995 F.2d 1317, 1321 (6th Cir. 1993), citing Strickland, 104 S.C.t at 2064.

Accordingly, Petiontioner requests that this Court grant an evidentiary hearing, grant his petition for writ of habeas corpus, and discharge him from his unlawful conviction and confinement.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

A copy of the foregoing was sent by U.S. mail to:

Michael Spillane
Attorney General's Office
P.O. Box 899
Jefferson City, MO 65102

on September 1, 1997.

/s (S.E. Rothenberg)/

EXHIBIT B, pp. 2-4

1. DEPARTMENT REPORTING JEFFERSON COUNTY SHERIFF'S DEPT.	9. CONTINUATION Details Stolen Property Wanted Arrested Victim Witness	2. DEPARTMENT FILE NO. 88-14,329
3. DATE OF THIS REPORT SATURDAY, 06-25-88		4. PAGE 2 OF 4 PAGES
5. VICTIM OR COMPLAINANT MOORE, KEVIN DWAINE		6. PLACE OF OCCURRENCE JEFFERSON COUNTY JAIL

SIR:

On Saturday., 06-25-88, at approximately 0700 hrs, I was unracking cells so inmates could go into the day room area.

After I unracked, A-TANKS cells inmate,

MOORE, KEVIN DWAINE,
W/M, AGE 20, D.0.B 11-09-67,
BOOKING NUMBER 88/1674,
HOUSE NUMBER A-4-1,

came runing up to the door crying asking me to get him out of the tank. I brought him up to the office and ask him to tell me what the problem was. He stated that four of the inmates in A-TANK made him pull his jump suit down, and one of them rubed some type of cream on his butt & rectum, and said he was going to fuck him, but a jailer walked by the tank so they stoped. (This incident happen about 2130 hrs, on FRIDAY, 06-24-88, in side A-4 cell).

He then moved into house number three to stay away from them, but while he was locked down in three house the three inmates that were in with him started spitting on him, and one of the inmates kept lighting matchs and putt them to his feet. Then when he went to sleep one of them wrote things on his back, and legs.

(THIS INCIDENT HAPPEN AROUND, 0130, ON 06-25-B8).

Inmate Moore did not know the names of the inmates who was involved, but was able to pick them out of a photo line up.

Pictures of all the inmates in A-TANK were shown to him in this order,

(01) DAFFNER, HOWARD LARRY,
W/M, AGE 41, D.O.B 11-05-46,
BOOKING NUMBER 88/1068
HOUSE NUMBER A-3-4.

(02) WASHINGTON, EDDIE
B/M, AGE 33, D.O.B 10-08-54,
BOOKING NUMBER 87/2737,
HOUSE NUMBER A-1-4.

(03) GODFREY, DIXIE ROSS,
W/M, AGE 35, D.O.B 11-13-52,
BOOKING NUMBER 88/1216,
HOUSE NUMBER A-4-2.

(04) BELL, STANLEY MUNSON,
W/M, AGE 27, D.O.B 12-12-60,
BOOKING NUMBER 88/0453,
HOUSE NUMBER A-2-2.

(05) PRUETT, JERRY WINFORD,
W/M, AGE 40, D.O.B 08-25-47,
BOOKING NUMBER 87/2908,
HOUSE NUMBER [illegible].

1. DEPARTMENT REPORTING JEFFERSON COUNTY SHERIFF'S DEPT.

9. CONTINUATION Details Stolen Property Wanted Arrested Victim Witness

2. DEPARTMENT FILE NO. 88-14,329

3. DATE OF THIS REPORT SATURDAY, 06-25-88

4. PAGE 3 OF 4 PAGES

5. VICTIM OR COMPLAINANT MOORE, KEVIN DWAINE

6. PLACE OF OCCURRENCE JEFFERSON COUNTY JAIL

(06) KING, PHILLIP LEE,
W/M, AGE 23, D.O.B 06-16-64,
BOOKING NUMBER 88/6899,
HOUSE NUMBER A-3-3.

(07) SPROCK, PHILLIP JOSEPH,
W/M, AGE 18, D.O.B 11-29-69,
BOOKING NUMBER 88/1412,
HOUSE NUMBER A-3-1.

(08) McFADDEN, KENNETH LEROY,
W/M, AGE 19, D.O.B 10-18-67,
BOOKING NUMBER 87/1843,
HOUSE NUMBER A-1-1.

(09) PRUETT, PAUL RICHARD,
W/M, AGE 32, D.O.B 11-12-55,
BOOKING NUMBER 88/1519,
HOUSE NUMBER A-4-4.

(10) MOORE, MICHAEL ANTHONY,
B/M, AGE 28, D.O.B 08-27-59;
BOOKING NUMBER 88/1368,
HOUSE NUMBER A-1-2.

(11) HUGHES, RAYMOND EDWARD,
W/M, AGE 31, D.O.B 07-18-56
BOOKING NUMBER 87/2582,
HOUSE NUMBER A-2-3.

(12) DEAL, JONATHON LEE,
W/M, AGE 19, D.O.B 05-08-69
BOOKING, NUMBER 88/1467
HOUSE NUMBER A-1-3.

After looking at the pictures he identified, (GODFREY,DIXIE (03), BELL, STANLEY (04), KING,PHILLIP (06), PRUETT,PAUL (09) as the ones who made him take off his jump suit), (KING,PHILLIP (06) as the one who rub the cream on him, and said he was going to fuck him).

Then he identified, (SPROCK,PHILLIP (07), McFADDEN,KENNETH (08), AND DEAL,

JONATHON (12) as the ones who spit on him. (McFADDEN, KENNETH (08) WAS Identified as the one who lit the matchs and put them to his feet.

(CONTINUE NEXT PAGE)

1. DEPARTMENT REPORTING
JEFFERSON COUNTY SHERIFF'S DEPT.

2. DEPARTMENT FILE NO.
88-14,329

3. DATE OF THIS REPORT
SATURDAY, 06-25-88

4. PAGE 4 OF 4 PAGES

9. CONTINUATION
Details
Stolen Property
Wanted
Arrested
Victim
Witness

5. VICTIM OR COMPLAINANT
MOORE, KEVIN DWAINE

6. PLACE OF OCCURRENCE
JEFFERSON COUNTY JAIL

I took pictures of the wrighting on inmate moores back & legs, then put him in padded cell for his on safty.

At approximately 0810 hrs I notified SGT, DEPEW DSN 701 of the incident. I am recommending that further investigation be done by detectives. See supplementary report by Deputy WILLE DSN 661.

RESPECTFULLY SUBMITTED
/s/ (Deputy Charles Bennett 611)
DEPUTY CHARLES BENNETT DSN 611

EXHIBIT D

[SEAL]

MISSOURI STATE PUBLIC DEFENDER SYSTEM
OFFICE OF STATE PUBLIC DEFENDER
3402 BUTTONWOOD
COLUMBIA, MISSOURI 65201-3722
(314) 442-1101

MEMORANDUM OF INTERVIEW

TO: Raymond Legg
FROM: Lea Ann Stoneking,
Paralegal/Investigator/s(LAS)/
DATE: April 30, 1991
CASE: King (Phillip) v. State, Jefferson County
No. CV190-6434-CC-54
RE: Paul Pruett
Reg. No. 169652
Potosi Correctional Center
Linda Wilkson, Caseworker (in MSU)
(314) 438-6000

As per your investigation request, I contacted and interviewed Paul Pruett, hereinafter, referred to as Paul, via the telephone. Paul was cooperative about discussing the incident that occurred at the jail.

Paul said he was King's codefendant. However, his case was eventually dismissed. Paul was represented by Robert "Bob" Williams from Clayton, Missouri.

Paul is currently serving an eight year sentence for robbery second degree. He pled guilty in this particular case.

While Paul was in the Jefferson County Jail, he was in the "same tank as King".

Paul volunteered the following information about the incident in question: "Put kid [Kevin Moore) in this tank used for class A felons . . . murder, robbery . . . hard core tank. Playing scared straight game . . . [Jailors] asked us to scare him [Moore] . . . I didn't want to participate."

It is Paul's opinion that the jailors may have put "the kid" in the tank to get a "confession" or to let him get a "taste of the jail".

Paul continued to give me his account of what was really happening to Kevin Moore. He stated, "checking him [Moore] out to see if he [Moore] would fight or scared . . . messin with him [Moore] . . . He [Moore] was weak. Doggin him [Moore] out, messin' with him [Moore] . . . take his [Moore] jumpsuit down . . . butt up in the air . . . humiliating him [Moore] . . . someone wiped grease on his [Moore's] butt . . . not molested, no penetration, intercourse, . . . Dave Coleman smeared the grease on his [Moore's] butt . . . playing with him [Moore], scarring him."

Paul also volunteered that "Kenny McFadden and Eric VonGruben [was] messin' over him" [Moore]. Paul recalled that they were "making him [Moore] holler 'I love Phil' . . . in a girlish voice . . . wrote stuff on him." Paul reasons that McFadden and VonGruben were not charged because they both had long sentences. He said McFadden had "2 lifes plus 90 years" and Von Gruben had, "life without parole". Paul said

"they basically abused" him [Moore]. Paul remarked that the hollering and

writing on Moore occurred during "lock down time". Paul said King was in the cell next to the one with Moore, McFadden and Von Gruben . . . He [King] was in my cell 4 off and on."

When I asked Paul why McFadden and VonGruben was down on King, he said, "a joke . . . name [King's] used more than anyone else's".

I asked Paul how he would respond if someone were to ask him whether Phillip King attempted to sodomize Kevin Moore. His response was "It's a lie."

Paul thinks the reason King was charged for this incident was he "beat them on another case." He added, "The boy [Moore] didn't want to press charges . . . drove him into it."

I asked Paul if he would be willing to testify on behalf of Mr. King to things that he stated during the interview. Paul said, "Sure would . . . the man [King] did not touch the boy."

Paul said he was not contacted by Frank Carlson or any of Carlson's associates. He indicated I was the only individual that had discussed the incident with him.

Please note that Paul mentioned that there was a lawsuit pending against the jail. He said there was overcrowding and a lot of other weird things going on inside the jail. Paul recalled that the Civil Liberties Union was at the jail.

/lgd

Carlson & Associates
Attorneys at Law

P.O. Box 521, Union, Missouri 63084
314/583-8300

Exhibit E

April 26, 1989

Mr. Phillip King
Route 2, Box 492
Union, Missouri 631184

Re: State of Missouri v. King (#2584)

Dear Mr. King:

Please find enclosed a copy of the police report that we have obtained in this matter. The police report gives us complete names, ages and dates of birth for the various witnesses. It appears that the only witness, for the prosecution, will be Kevin Moore. It appears that other people did additional things to Mr. Moore. A copy of Mr. Moore's handwritten statement is enclosed.

The last page of this report is rather interesting. Kevin Moore states at this point that Dixie Godfrey was the instigator. Godfrey waived his right to remain silent and discussed this matter with the police. He said they're "funning" included talking with Moore about having sex with him. Paul Pruett advises that he was not aware of any threats made to anyone.

On April 24, 1989 I was in Jefferson County on another matter. The prosecutor who is handling this matter spoke to me about the police reports and our obtaining them. The prosecutor informed me that it was very much his opinion that you "skated" on the murder charge. As we previously suspected, this prosecutor is very unpleased with the result from his previous charge against you and seems quite pleased to push this case. I asked him what he wanted out of this case and he said "a conviction".

When you have retained us, we will begin the deposition process and perhaps we will be able to then convince this prosecutor that Kevin Moore would probably say anything about anyone just to get back at them. I will let you know when I have something further.

Sincerely yours,
Richard D. Whiffen

RDW/jmb

Exhibit F

Missouri Mel Carnahan, Governor
DEPARTMENT OF
CORRECTIONS Dora B. Schriro, Ed.D., Director
Board of Probation and Parole
117 Connnerce Drive
Jefferson City, Missouri 65109

November 21, 1994

Ms. Aloma Rackley
2128 Oakshire Drive
Union, Missouri 63084

Dear Mrs. Rackley,

This letter is to confirm our telephone conversation that occurred on this date.

Once again looking up information on Mr. Jerry Pruett, and Mr. Paul Pruett , and on Mr. **Phillip L.** King at no time on record is there a time when these individuals were incarcerated together.

If any further questions, please call.

Sincerely,
/s/
Linda S. Buschjost

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

PHILLIP KING,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 4:97-CV-748 CDP
	)	
GENE STUBBLEFIELD,	)	
	)	
Respondent.	)	

TRAVERSE

COMES NOW Petitioner, by and through counsel, and states as follows in reply to Respondent's Response To Order To Show Cause Why Writ Of Habeas Corpus Should Not Be Granted.

I. PETITIONER'S CLAIM NO. 1:

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

This Court must review the state court's legal conclusions and factual determinations involving mixed questions of law and fact de *novo*. Here, the state court's findings on Petitioner's post-conviction remedy motion were unreasonable based on the record presented which, by far more than a preponderance of the evidence, exonerated Petitioner of the crime. In the instant case, where ineffective assistance of counsel was the only reasonable determination based on the record

before the PCR court,[1] no presumption of correctness can attach.

A. STANDARD OF REVIEW

The "determination . . . of a factual issue" by a state court under 28 U.S.C. 2254(d) refers only to "basic, primary, or historical facts" but not to "so-called mixed questions of fact and law, which require the application of a legal standard to the historical fact determinations." Thompson v. Keohane, 116 S.Ct. 457, 464 (1995) (referring to superseded 2254(d), quoting Townsend v. Sam, 372 U.S. 293, 309 n.6 (1963)). Therefore, "[t]his Court is . . . free to conduct an independent review of 'so-called mixed questions of fact and law which require the application of a legal standard to the historical 'fact determinations.'" Wilkins v. Heath, 933 F.Supp. 1496, 1505 (W.D. Mo. 1996), quoting Thompson, 116 S.Ct. at 459.

Further, because the relevant language in the new sections, 2254(d) (2) and 2254(e)(1)[2], mirrors the language in the superseded provisions of the former 2254(d), the new sections must be interpreted consistently with prior interpretations of that superseded section. See, e.g. State ex rel. Robinson v. Buchler, 936 F.Supp.590, 595 (E.D. Wis. 1996) (new Act's presumption of correctness, like prior version, does not apply to mixed

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[1]In addition to the testimony presented at the PCR hearing, the attached affidavits, as well as the one Petitioner has moved to file under seal, bring into sharp relief just how woefully inadequate Carlson was by his failure to interview alibi witnesses.

[2]The new legislation, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), became effective on April 24, 1996.

questions of fact and law, which are subject to "independent" review); Hall v. Washington, ___ F.3d ____, 1997 WL 42967 (7th Cir. 1997) (under the new section, 28 U.S.C. 2254(d)(1), the court's "review of state courts' legal determinations continues to be de novo" as is its "review of mixed questions of law and fact") (citations omitted); Wilkins, 933 F.Supp. at 1504-1505 (interpreting the old and new habeas sections consistently).

Thus, whether under the old or new habeas law, "the parameters of this inquiry [into the "reasonableness" of trial counsel's strategy] are not limited by the presumption of correctness afforded factual findings under 28 USC §2254" because the "reasonableness of that strategy is a mixed question of fact and law to which the presumption of correctness does not attach." Berryman v. Morton, 100 F.3d 1089, 1096, 1103-1105 (3d Cir. 1996); accord, Jackson v. Herring, 42 F.3d 1350, 1367 (11th Cir. 1995) ("whether an attorney's tactical decision is a reasonable one, falling within the range of professional competence, is an issue of law reviewed de *novo* by this court"); Battle v. Delo, 19 F.3d 1547, 1552 (8th Cir. 1994) (same) . "Here, this Court decides questions of law and decides factual issues not resolved by he state courts even though the evidence had been developed there." Wilkins, 933 F.Supp. at 1505; see also id. at 1515 (state court's conclusion that a procedural bar precluded review of certain claims "is not entitled to a presumption of correctness . . . . This is a mixed question of federal law and fact").

B. PRESUMPTION OF FACTUAL CORRECTNESS DOES NOT APPLY TO STATE COURT DETERMINATIONS IN THE INSTANT CASE

The State, with no analysis whatsoever, incorrectly asserts that, under the new habeas law, factual determinations made by the state court must be presumed correct and therefore cannot be reviewed by this Court — "even if the reasoning of the [state] court is wrong or even unreasonable." State's Response at pp. 4, 6, citing 2254(d) (emphasis original). Contrary to the State's bald assertion, the examination of state court determinations under the AEDPA tracks the process applied under the superseded habeas law. See e.g., Berryman, 100 F.3d at 1104 ("The AEDPA did not dramatically change this provision of habeas jurisprudence"); Flowers v. Hanks, 1996 WL 534791 at *3 (N.D. Ind. 1996) (the presumption of correctness under the AEDPA and the preexisting law are similar).

Here, the Court may review de *novo* mixed questions of law and fact presented in state court. Berryman, 100 F.3d at 1096, 1103-1105; Jackson, 42 F.3d at 1367; Battle, 19 F.3d at 1552; Wilkins, 933 F.Supp. at 1505. Further, to analyze the state court factual findings under the AEDPA, 2254(d)(2) requires this Court to consider whether there was an adjudication of a factual issue on the merits in the state court proceedings and, if so, whether the state court reached a *reasonable* determination of the facts in light of the evidence presented in the state court proceeding. See 2254(d)(2), (e)(1); Berryman, 100 F.3d at 1104-1105. The PCR state court's findings of fact, including its finding that Petitioner's trial court counsel was not ineffective,

are unreasonable given the record before that court — thus entitling Petitioner to habeas corpus relief. See 2254(d)(2).[3] "After all, a state court determination of a factual issue which was not fairly supported by the record can hardly be said to be a reasonable determination." Berryman, 100 F.3d at 1104-1105; see also Purkett v. Elem., 115 S.Ct. 1769, 1771-1772 (1995) (state court factfindings "may be set aside . . . if they are 'not fairly supported by the record'"); Weber v. Murphy, 15 F.3d 691, 694 (7th Cir.), cert. denied, 114 S.Ct. 1865 (1994) (under old Act, state court's analysis of the facts and application of the appropriate law was "unreasonable" because the record did not fairly support its factual findings).

The pertinent facts, wholly unchallenged by the State, are that King's trial attorney, *inter alia*, failed to interview or call at trial certain alibi witnesses who supported King's claim of innocence and, further, failed to offer mitigating medical evidence. "[Trial] counsel's own testimony [at the PCR hearing], and the record of his actions at the trial, plainly demonstrate that the state [PCR] court's factual determination that trial counsel had a strategy was an unreasonable determination in light of the evidence presented in the state court proceedings." Berryman, 100 F.3d at 1105 (emphasis added). No presumption of

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[3]If and only if, the state court determinations were "reasonable" can the presumption of correctness attach. However, such presumption can still be rebutted by "clear and convincing" evidence. The switch from the superseded language of the old Act, "by convincing evidence, " is more matter of semantics than substance. See 2254(e)(1) and superseded 2254(d).

correctness can attach to the state court findings at Petitioner's PCR hearing.

C. PETITIONER WAS DENIED DUE PROCESS OF LAW AND HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN THAT TRIAL COUNSEL FAILED TO INVESTIGATE AND PRESENT EXCULPATORY EVIDENCE OF ALIBI WITNESSES AND OTHER DEFENSE WITNESSES PROVIDED BY PETITIONER.

The State has not challenged King's first claim other than to misstate the legal significance of the PCR court's, factfinding. Therefore, with the proper legal standard applied, the State must concede the merit of the argument and supporting evidence presented by Petitioner King: first, that the state court factual findings were unreasonable; second, that King's trial attorney was ineffective (thereby constituting "cause" for any defaulted claims of constitutional error); and, third, that such ineffectiveness caused actual prejudice to King.

1. Trial Counsel *Was* Ineffective

a. Trial Counsel Failed To Interview/Call Alibi Witnesses

"The Eighth Circuit recognizes that 'the decision to interview a potential witness is not a decision related to trial strategy. Rather, it is a decision related to adequate preparation for trial.'" Schlup v. Bowersox, 1996 U.S LEXIS 8887 at *39 (E.D. Mo. May 2, 1996) (Hamilton, J.) (granting pet:ition) (citation omitted). In Schlup, the court rejected the trial counsel's explanation that he did not interview inmate-witnesses based on his

speculative belief that, because of their inmate status and possible fear of retaliation by other inmates, such witnesses would not be reliable or credible. Id. at *43. "Trial counsel did not have a sufficient basis for believing that investigating [inmate] eyewitnesses would not benefit the defense." Id. at *48. As the Schlup court noted in language directly applicable to this case:

> Here, . . . defense counsel, despite knowing of [petitioner's] at least colorable alibi, did essentially no pre-trial investigation.
>
> [Tirial counsel determined that inmates would lack credibility. Therefore, he decided not to interview the eyewitnesses . . . . Without even personally interviewing the eyewitnesses, trial counsel "was ill eguipped to assess [theirl credibility." (Citations omitted.)

Id. at *55 (emphasis added); see also id. at *48-56, relying on Kenley v. Armontrout, 937 F.2d 1298, 1308 (8th Cir.), cert. denied sub. nom, Delo v. Kenley, 502 U.S. 964, 112 S.Ct. 431 (1991) ("'Counsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when s/he has not yet obtained facts on which such a decision could be made'") (citation omitted); United States ex rel. Cosey v. Wolff, 727 F.2d 656, 657-658 (7th Cir. 1984) ("trial counsel's 'rejection of the proffered witnesses without interviewing or investigating such witnesses [fell] below minimum standards of professional competence' [where] [t]rial counsel based his decision on his belief that the state's case was so weak").

Under such clear case law, the failure of defense counsel in the instant case, Frank Carlson, to interview alibi witnesses necessarily made his performance fall far "short of the diligence that a reasonably competent attorney would exercise under similar circumstances." Lawrence v. Armontrout, 900 F.2d 127, 129 (8th Cir. 1990) (admission by trial lawyer that he failed to attempt to interview potential alibi witnesses rendered the lawyer's conduct ineffective). "Without even personally interviewing the eyewitnesses, trial counsel 'was ill equipped to assess [their] credibility . . . despite the factors tending to impugn [their[] credibility.'" Schlup, 1996 U.S. Dist. LEXIS 8887 at,*55, citing Bryant v. Scott, 28 F.3d 1411, 1417 (5th Cir. 1994) (trial counsel's decision not to interview inmate-alibi witnesses fell below objective standard of reasonableness because, without such interviews, "'[trial counsel] was ill-equipped to assess his credibility or persuasiveness as a witness, despite objective factors [such as prior convictions] tending to impugn [such witness'] credibility'") (citations omitted).

Here, Carlson admitted that he failed to make any effort whatsoever to interview or call witnesses to aid Petitioner's alibi defense. Like the trial counsel in Schlup and cases cited therein, Carlson "defended" his failure by speculating — without any factual support — that the alibi witnesses proffered to him by Petitioner King would not have been credible or reliable because of their criminal histories, because of Carlson's (erroneous) belief that Petitioner knew these witnesses from a prior incarceration, and because Carlson apparently believed that the State's case against King was so weak that he would not be

convicted. See Wolff, 727 F.2d at 657-658 (where trial counsel in part "based his decision [not to interview proffered witnesses] on his belief that the state's case was so weak," his performance fell below professional standard of competence)

As the accompanying affidavits (and the Petition's exhibits) demonstrate, not only was King nowhere near the victim when the lotion incident occurred but other inmates, had they been interviewed, could have told Carlson who the real perpetrator was. Paul Pruett was never contacted by Carlson. He has stated under oath, at the PCR hearing and by affidavit filed herewith, that Petitioner King never put lotion on the victim, Kevin Moore, and, in fact, was never in the same cell with Moore. Pruett saw another inmate, David Coleman, in the cell holding a bottle of lotion while Moore lay face-down on a bunk and other inmates were laughing — but King was not present. Pruett 12/20/97 Afft., para. 3-5. Pruett was charged along with King and then pressured by the state to testify against Petitioner in exchange for dropping the charge, but he refused to do so because "Phillip King did not do anything to Moore." Id. at para. 5. The charge against Pruett was later dismissed for lack of evidence. Id. at para. 6. Pruett would have been willing to testify for King at this trial. Id. at para. 6.

John Doe[4], another inmate at the Jefferson County jail, was never contacted by Carlson or anyone else on Petitioner's behalf. He has stated under oath that he saw Kevin Moore lying on a

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[4]"John Doe" is a pseudonym for an inmate whose affidavit Petitioner has moved to file under seal in an accompanying motion for a protective order.

bunk while David Coleman told Moore to "hike up his butt" and then smeared some lotion substance on Moore's buttocks. Doe 12/16/97 Afft. at para. 5. King was never in the cell with Moore and did not smear lotion on Moore or do anything else to him. Id. at 5-6, 8.

The district court in Schlup, in words that aptly describe Carlson's substandard performance in this case, found that trial counsel's performance fell below an objective standard of reasonableness in that "[t]rial counsel failed to, interview eyewitnesses despite knowing that no physical evidence linked petitioner to the scene. Trial counsel possessed sufficient information to identify potential witnesses. Moreover, eyewitness testimony that Petitioner was not present at the scene of the [crime] would have bolstered the defense's theory of alibi/mistaken identity." Schlup, 1996 U.S. Dist. LEXIS 8887 at. at *56 (emphasis added).

Thus, Carlson's "explanations" for not interviewing alibi witnesses do not and cannot constitute trial "strategy"; to the contrary, Carlson's failure to interview these alibi witnesses, regardless of the fact that they had criminal records, indisputably represented substandard performance, as the cases discussed above make amply clear.

b. Trial Counsel Failed To Offer Medical Evidence

The State also admits that Carlson did not introduce evidence of King's mobility-limiting medical condition. Such failure to present medical evidence tending to show that injury prevented the petitioner from committing the charged act

renders counsel's performance deficient. See Cunningham v. Zant, 928 F.2d 1006, 1018 (11th Cir. 1991). Here, Carlson "failed to substantiate the existence of this injury or its effects on [Petitioner King] by introducing [King's] medical records . . . and by not referr[ing] to [King's] injury during [his] closing argument, thereby failing to place this evidence squarely in front of the jury." Id.; see also Dr. Fox 12/11/97 Afft. (He was never contacted but would have testified that King's back injury and brace restricted his mobility); Doe Afft. at para. 5 (King was wearing his back brace when he was in the K\Jefferson County jail).

As with Carlson in the case at bar, counsel in Cunningham was ineffective for failing to present mitigating medical evidence even though two witnesses testified about such evidence at trial. Here, when Carlson's failure to present mitigating medical evidence is viewed in conjunction with his failure to interview and present alibi witnesses, the inadequate performance of Carlson stands out as far worse than that of counsel in Cunningham.

2. Trial Counsel's Errors Prejudiced The Trial Outcome

"In determining whether counsel's errors prejudiced the defense, the court 'must consider the totality of the evidence before the judge or jury.' "In this case, as a result of trial counsel's 'unprofessional errors,' the jury did not hear inmate testimony that Petitioner was not present at the scene of the crime." Schlup, 1996 U.S. Dist. LEXIS 8887 at *57 (citation omitted) (emphasis added). As a result, "there is a reasonable probability that, but for trial counsel's failure to interview eyewitnesses, the result of the proceeding would have been different." Id. at *70,

citing Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 2064 (1984).

Further, "'a verdict. . . only weakly supported by the records is more likely to have been affected by errors than one with overwhelming record support.'" Schlup, 1996 U.S. Dist. LEXIS 8887 at *54 (failure to interview eyewitnesses despite lack of physical evidence linking petitioner to crime constituted ineffective assistance) (citation omitted). Where, as here, the State's case was incredibly weak — depending solely on a reluctant victim who gave inconsistent testimony with absolutely no physical evidence to tie the disabled King to the crime — Carlson's failure to investigate and interview alibi witnesses means that "[Petitioner] might have been denied counsel altogether." Lahay v. Armontrout, 923 F.2d 578, 579 (8th Cir. 1991). The inescapable conclusion is that "there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting [King's] guilt." Strickland, 104 S.Ct. at 2064.

II. PETITIONER'S CLAIM NO. 2:

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

A. There Is No Procedural Bar

Contrary to the State's contention, Petitioner is not procedurally barred from pursuing this claim. Even if he were, he overcomes such bar by passing through the Schlup gateway or "miscarriage of justice" exception as set forth under Claim 3, *infra.*

"A state procedural rule is not adequate to bar federal relief if the petitioner was acting pro se at the time of the default and did not make a

knowing and intelligent waiver of rights." Wilkins, 933 F.Supp. at 1518 (W.D. Mo. 1996) (court held that no procedural bar applied where petitioner had been acting pro se at the time he did not comply with a state procedure). Moreover, "[w]hether a state procedural rule is adequate to bar federal review is an issue of federal law, to be decided by the federal Court." Id., citing Williams v. Lockhart, 873 F.3d 1129, 1131-1132 (8th Cir. 1989); see also Sloan v. Delo, 54 F.3d 1371, 1379 (8th Cir. 1995), cert. denied, 116 S.Ct. 728 (1996) (regarding procedural default, issue of "adequacy of a state procedure presents a question of federal law"); Johnson v. Crawley, 40 F.3d 341, 344 (10th Cir. 1994) ("Whether a petitioner has procedurally defaulted his federal claims is a question of federal law.") Further, "a petitioner contending relevant disputed facts must have a fair hearing regardless of the procedural posture of the claim in state court." Smith v. Wyrick,693 F.2d 808, 810 (8th Cir. 1982); see also Ashby v. Wyrick, 893 F.2d 789, 793 (8th Cir. 1989) (no procedural bar because Missouri law [now superseded] on challenging the effectiveness of appellate counsel "was at least arguably confusing").

Under the reasoning in Wilkins, Petitioner is not procedurally barred from challenging the effective of his appellate counsel in this habeas action. Here, Petitioner's appellate counsel, Dennis Myers, performed well below a minimum professional standard. His poor performance — particularly given the weak evidence against Petitioner at trial and his trial counsel's inexcusable failure to call alibi witnesses and present mitigating medical evidence — doomed

what would have been Petitioner's excellent chance of reversal on appeal.

After he lost his appeal, Petitioner was, like the petitioner in Wilkins, on his own, in prison, unrepresented by any counsel. Indeed, it was not until December 17, 1996, that Myers was "publicly reprimanded" by the Missouri Supreme Court for his inadequate representation of, among others, Petitioner. See First Amd. Pet., Ex. G. This very recent reprimand of Myers because of his unprofessional conduct presented new and additional evidence—by a neutral third party—of appellate counsel's inadequacies in Petitioner's appeal. Petitioner, still acting *pro se*, then filed a habeas petition in federal court just a few months later, on April 22, 1997, alleging, *inter alia*, ineffective assistance of appellate counsel. His *pro se* petition was filed just one day prior to the April 23, 1997 deadline after which he would have forever lost his right to pursue such federal remedy regardless whether he had filed a motion to recall the mandate in state court.[5]

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[5]A review of cases indicates that state motions to recall the mandate were nearly always "summarily denied." See, e.g., Oxford v. Delo, 59 F.3d 741, 743 (8th Cir. 1996); Nave v. Delo, 22 F.3d 802, 806 (8th Cir. 1994). Where it would have been futile to pursue a state remedy, failure to exhaust is excused. See Duckworth, Warden v. Serrano, 454 U.S. l, 3, 102 S.Ct. 18 (1981) (explaining futility concept under §2254); Williams v. James, 770 F.Supp. 103, 105-106 (W.D. N.Y. 1991) ("further exhaustion" would have been futile).

III. PETITIONER'S CLAIM NO. 3:

ACTUAL INNOCENCE

A. Petitioner Meets The Schlup And Herrera Standards

"[T]he individual interest in avoiding injustice is most compelling in the context of actual innocence . . . . Indeed, concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system." Schlup v. Delo, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed2d 808, 834-835 (1995). In assessing a claim of actual innocence, "the habeas court must make its determination concerning the petitioner's innocence 'in light of all the evidence, including that alleged to have been illegally admitted . . . and evidence tenably claimed to have been wrongly excluded or to have become available after the trial.'" Id. at 836 (citation omitted) (emphasis added).

To the extent this Court may otherwise decide that it cannot reach the merits of King's ineffective assistance of counsel and/or, appellate counsel

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Ironically, as the State points out in its response, were Petitioner to dismiss his pending habeas claim 2 to pursue the state motion to recall the mandate now, after the federal habeas deadline, he likely would be barred from renewing his pursuit of such habeas relief because such deadline has passed. See Resp. Br. at pp. 3-4. Dismissal of his claim, effectively with prejudice, would be a terrible injustice. See Lonchar v. Thomas, 116 S.Ct. 1293, 1297, 1299, 1301 (1996) (dismissal of a first habeas petition "is a particularly serious matter, for that dismissal denies petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty").

claims, he has presented sufficient evidence to pass through the Schlup gateway of procedural actual innocence based on the affidavits filed herewith and, the evidence presented at his PCR hearing. Based on such evidence, which "bec[a]me available after trial," "'it is more likely than not that no reasonable juror would have convicted [Petitioner] in light of the new evidence.'" Schlup, 1996 U.S. Dist. LEXIS 8887 at *4, quoting Schlup v. Delo, 912 F.Supp. 448, 449, 454-455 (E.D. Mo. 1995) (Hamilton, J.) (petitioner satisfied "actual innocence" standard for court to reach merits of his constitutional claims because court found eyewitness testimony of fellow inmates to be sufficiently reliable).

The new evidence presented by Petitioner King casts considerably more doubt on the credibility of the already-inconsistent victim, Kevin Moore, particularly when examined in conjunction with the State's total lack of corroborating evidence. The State's case, even when viewed in the most favorable light, was extraordinarily weak. It depended solely on the haphazard testimony of one person, the victim, Kevin Moore, who admittedly never even saw the perpetrator's face and purportedly identified Petitioner by the sound of his "high-pitched" voice (when Petitioner's voice is, in fact, not at all high-pitched). In fact, Moore failed to show up for two preliminary hearings in Petitioner's case. Further, the cases against Paul Pruett, also charged in the Moore incident, was dismissed for lack of evidence. Pruett 12/11/97 Afft.

More significantly, especially under the reasoning of the factually analogous case of Schlup, is the fact that Petitioner was never seen

anywhere near victim, Kevin Moore. Had Carlson presented such alibi testimony, it would have wholly undermined the State's already weak case because "'[a] verdict . . . only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.'" Schlup, 1996 U.S. Dist. LEXIS 8887 at *57 (citation omitted). This is especially true here, as it was Schlup, where no physical evidence tied Petitioner to the crime. "[I]t surely cannot be said that a juror, conscientiously following the judge's instructions requiring proof beyond a reasonable doubt, would vote to convict" in light of this strong exculpatory evidence. Schlup, 130 L.Ed.2d at 839. The State's case, marginal at best, totally collapses when considered in light of the new evidence.

The trial in Petitioner's case was riddled with constitutional error. Even if it were not, he is nonetheless entitled to habeas relief under the more onerous "actual innocence" standard discussed in Herrera v. Collins, 113 S.Ct. 853 (1993) because his new evidence "unquestionably" establishes his innocence. See Schlup, 115 S.Ct. at 862. Indeed, the evidence of Phillip King's innocence is so strong that his conviction is "constitutionally intolerable." See Herrera, 113 S.Ct. at 870 (O'Connor, J., concurring)

IV. AN EVIDENTIARY HEARING IS REQUIRED

Phillip King's petition has set forth facts which, if true, entitle him to the relief requested. This, in and of itself, entitles him to an evidentiary hearing to prove those facts. Wade v. Armontrout, 798

F.2d 304, 306 (8th Cir. 1986). Moreover, Petitioner is clearly entitled to an evidentiary hearing under the criteria announced in Townsend v. Sain, 372 U.S. 293 (1963).

Townsend set forth six circumstances, any one of which mandated an evidentiary hearing for a habeas petition filed by a prisoner in State custody:

> "(1) The merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing[6] or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair hearing.

372 U.S. 293, 313.

In the instant case, the state fact-finding proceeding was not adequate to provide a full and

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[6]Keeney v. Tamayo-Reyes, 504 U.S. 1, 112 S.Ct. 1715 (1992) altered this component of Townsend. With regard to the fifth circumstance discussed in Townsend, material facts not adequately developed, Keeney partially overruled Townsend by now requiring a showing of cause and prejudice or miscarriage of justice if the petitioner failed to adequately develop the facts in the state court. 112 S.Ct. 1715, 1719-20. However, even if Keeney applied to the instant case, Petitioner would be entitled to an evidentiary hearing if a "fundamental miscarriage of justice" would arise if such hearing were not held. 504 U.S. at 12.

fair hearing because the PCR court reached an unreasonable determination based on the record before it and, further, it did not have the benefit of the substantial allegations of new evidence presented with this petition. This "Court's broad authority to [hold an evidentiary hearing] is well-established under Townsend v. Sain[.,] [D]istricts courts always have the discretion to hold evidentiary hearings on dispositive factual issues in habeas litigation: 'In every case, [the district court] has the power, constrained only by [its] sound discretion, to receive evidence bearing upon an applicant's constitutional claim.'" Wilkins, 933 F.Supp. at 1503-1504 (W.D. Mo. 1996) (court held evidentiary hearing where "disputed factual issues were not settled and some findings by the state courts were perplexing") (Citations omitted.)

The Townsend criteria survived the new habeas law intact. Id. at 1504. Where, as here, any failure to present evidence at the state level was caused by the incompetence of Petitioner's counsel, and not by Petitioner, an evidentiary hearing can be held. The new habeas law's "limitation on evidentiary hearings in a federal habeas court applies where a petitioner failed to develop facts in state court, which did not happen in this case." Wilkins, 933 F.Supp. at 1504. Thus, the [new] Act does not preclude the Court generally from holding a hearing when the facts supporting a claim were not developed in state court." Id.

The fact that constitutional violations have resulted in the incarceration of Petitioner for a crime he did not commit is a fundamental miscarriage of justice. It would be a further

miscarriage of justice to deny him an opportunity to present evidence of his actual innocence. Schlup v. Delo, 115 S.Ct. 851 (1995). However, even if the Court were to interpret §2254(e) of th new Act to deny Petitioner a hearing, the Court nonetheless derives the authority to hold such hearing from the Due Process clause. Cf. United States v. Mendoza-Lopez, 481 U.S. 828, 837-838 (1987) ("where a determination made in an administrative proceeding is to play a critical role in the subsequent imposition of a judicial sanction, there must be some meaningful review of the administrative proceeding").

This same principle applies with equal, if not greater, force if §2254(e) is given a hearing-preclusion interpretation. Where, as here, Petitioner has been sentenced to 30 years without parole — a lifetime — for a crime he did not commit, due process mandates that he be permitted meaningful review of claims alleging constitutional defects in the conduct of his trial and other state proceedings. Due process "means at the very least that where . . . judicial review of [a] proceeding [is foreclosed], an alternative means of obtaining judicial review must be available." Id. at 838. Here, such alternative forum is an evidentiary hearing in federal court. Further, a "'serious constitutional question' would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." Webster v. Doe, 486 U.S. 592, 603 (1988) (citation omitted)

V. CONCLUSION

Based on the authorities cited above as well as the well-supported allegations of Petitioner's First

Amended Petition and Traverse, Petitioner is entitled to habeas relief including an evidentiary hearing.

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Attorney for Petitioner

Certificate of Service

The undersigned certifies that a copy of the above was mailed first class on the 23d of December, 1997 to Respondent's counsel:

Michael Spillane
Assistant Attorney General
Missouri Attorney General's Office
P.O. Box 899
Jefferson City, MO 65102.

/s (Rebecca S. Stith)/

AFFIDAVIT OF PAUL PRUETT

I, Paul Richard Pruett, of lawful age, state the following is true to the best of my knowledge, information and belief:

1. I was incarcerated in the Jefferson County Jail in June 1988 with Phillip King, Kevin Moore, Jerry Pruett, Dixie Godfrey, David Coleman, Kenny McFadden and others.

2. I remember Kevin Moore being placed in our cell. I also remember a number of inmates, including Kenny McFadden, John Deal and David Coleman, giving Moore trouble or "messing with him."

3. The night after Moore was placed in the "tank," I was in the bullpen with Phillip King. I went back to my cell to get some food or cigarettes. When I went in the cell, I saw Moore lying face-down on his bunk with his face in a pillow or blanket. Coleman was sitting on the other bottom bunk with a bottle of lotion and other guys were laughing and making fun of Moore.

4. I took my cigarettes and left the cell and returned to the bullpen. Phillip King was never in the cell with Moore or the others that night. Later I was charged with sodomy or attempted sodomy against Moore.

5. Sometime after this incident, I was placed in Potosi Correctional Center. While I was

in Potosi, I was visited by a Detective Meyers and another detective from Jefferson County. They said the prosecutor would drop the charges against me if I testified against Phillip King. I told them Phillip King did not do anything to Moore. The charges were later dismissed at a hearing for lack of evidence. I was represented by Robert Wilkins at the hearing.

6. I was never contacted by anyone before Phillip King's trial. My charges were dismissed before his trial and I would have been willing to testify on his behalf. The first time I was contacted by someone for Philip King was to testify at his post-conviction hearing.

7. I am still willing to testify on Phillip King's behalf.

8. I met with Stephen Rothenberg and Rebecca Stith, who identified themselves as lawyers representing Phillip King, on December 11, 1997. Mr. Rothenberg wrote out my affidavit by hand. I met with Mr. Rothenberg and Ms. Stith again on December 20, 1997 and reviewed my affidavit for accuracy after they had typed it up.

/s/ 12/20/97
Richard Paul Pruett Date

Subscribed and sworn to before me this 20nd day of December, 1997.

/s (Dorothy J. [illegible])/
Notary Public

My Commission Expires:

Notary Public — Notary Seal
St. Louis County, State of Missouri
My Commission Expires February 3, 1998

AFFIDAVIT OF THOMAS J. FOX, M.D.

1. I am a physician who treated Phillip King during the period May 23, 1988 to October 3, 1988 for compression fractures to T1 and T12 that he sustained in an accident in late April 1988.

2. On June 29, 1988, I released Mr. King to return to work wearing a brace and with a restriction not to lift anything weighing more than 20 pounds.

3. The compression fractures would have restricted Mr. King's mobility early on. In addition, the brace would have affected his mobility.

4. It would have been possible for me to testify at Mr. King's trial in April 1990; however, I was not contacted at that time by an attorney or anyone else acting on Mr. King's behalf.

/s/
Thomas J. Fox, M.D.

Subscribed and sworn before me on this 11th day of December, 1997.

/s (Wilma J. Miller)/
NOTARY PUBLIC

My commission expires: 02/18/98

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

PHILLIP KING,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 4:97-CV-748 CDP
	)	
GENE STUBBLEFIELD,	)	
	)	
Respondent.	)	

PETITIONER'S MOTION TO FILE AFFIDAVIT UNDER SEAL

COMES NOW Petitioner, through counsel, and moves the Court for leave to file the affidavit of "John Doe" under seal after *in camera* review (if necessary) by the Court. In support, Petitioner states:

1. "John Doe" is a pseudonym for an individual currently incarcerated in the Algoa Correctional Center in Jefferson City, Missouri.

2. Doe and another current inmate at Algoa, David Coleman, were in the Jefferson County jail when the incident involving Kevin Moore occurred. By affidavit, Doe states that he witnessed Coleman smearing the lotion on Moore's buttocks and that Petitioner King had nothing to do with Moore or the lotion incident. Doe Afft. at para. 5-6 (copy attached hereto with actual name redacted)

3. Because Doe is currently incarcerated in the same institution as Coleman, he fears being labeled an "informer" and retaliated against should Coleman or others learn of his sworn statement. He provided the affidavit after Petitioner's counsel agreed to fil.e a motion asking that his affidavit be filed under seal for his own protection. at para. 3.

4. Respondent has been notified of this motion and petitioner's intent to bring such motion to the Court's attention at informal matters on December 23, 1997, and will be shown the unredacted Doe affidavit should the Court permit such affidavit to be filed under seal.

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ATTORNEY AT LAW

/s/

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Attorney for Petitioner

Certificate of Service

The undersigned certifies that a copy of the above was faxed on December 22nd and mailed first class on the 23rd of December to Respondent's counsel:

Michael Spillane
Assistant Attorney General
Missouri Attorney General's Office
P.O. Box 899
Jefferson City, MO 65102.

/s

(Rebecca S. Stith)/

AFFIDAVIT OF [REDACTED]

I, [REDACTED], being of legal age, swear to the following:

I am currently an inmate in the Algoa Correctional Center in Jefferson City, Missouri. On October 1, 1997 I was contacted by Stephen E. Rothenberg who identified himself as Phillip King's lawyer. Mr. Rothenberg asked me a

number of questions and I provided the following information:

1. During 10 or 11 months in 1988, 1 was incarcerated at the Jefferson County Sheriff's Department Jail in Hillsboro, Missouri. During this time, Phillip King, Paul Pruett, Jerry Pruett, David Coleman, Kevin Moore and several other people were also incarcerated with me in "A" tank. Many of us would frequently gather in the common area of the prison to talk, play cards, etc. I remember Phillip King wearing a back brace during this time. I remember Kevin Moore being in the cellblock for a short time.

2. I remember some of the inmates harassing Kevin Moore when he was first put in the cellblock. However, I never saw Phillip King do anything to Kevin Moore.

3. At no time after Moore was in the cellblock was I contacted by a lawyer concerning Phillip King or Kevin Moore.

The foregoing is true to the best of my knowledge and belief.

/s ([REDACTED])/

Subscribed and sworn before me this 8 day of October, 1997.

Julie Koenigsfeld /s (Julie Koenigsfeld)/
Notary Commission Cole County
Missouri
My Commission expires 12-9-2000.
[SEAL]

Docket as of January 23, 2001 10:42 pm
Web PACER (v2.3)
U.S. District Court
Eastern District of Missouri (Eastern)

CIVIL DOCKET FOR CASE #: 97-CV-748

King v. Stubblefield
Filed: 04/22/97
Assigned to: Honorable Catherine D. Perry
Demand: $0,000
Nature of Suit: 530
Lead Docket: None
Jurisdiction: Federal Question
Dkt# in other court: None
Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

PHILLIP KING petitioner	Rebecca S. Stith [term 08/24/98] 314-539-7895 fax [COR LD NTC] EEOC 1222 Spruce Street Room 8.100 St. Louis, MO 63103 314-539-7910 FTS 539-7895

Stephen E. Rothenberg
314-721-0606 fax
[COR LD NTC]
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314-721-2500
FTS 721-0606

v.

GENE STUBBLEFIELD, acting superintendent
respondent

Michael J. Spillane
573-751-3825 fax
[COR LD NTC]
ATTORNEY GENERAL OF MISSOURI
Assistant Attorney General
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DOCKET PROCEEDINGS

DATE	#	DOCKET ENTRY
4/22/97	1	PETITION FOR WRIT OF HABEAS CORPUS by petitioner Phillip King (aeh) [Entry date 04/23/97]
4/22/97	2	TRACK INFORMATION STATEMENT filed by petitioner Phillip King ;track 2 preferred (aeh) [Entry date 04/23/97]
4/22/97	3	RECEIPT # s97-004276 in the amount of $ 5.00 for civil filing fee (aeh) [Entry date 04/23/97]
5/2/97	4	CASE MANAGEMENT ORDER by Honorable Catherine D. Perry; administrative(4) track, response to order show cause 6/16/97 (cc: all counsel, copy of entire file to MO Atty General) (kks) [Entry date 05/06/97]

5/7/97	5	ATTORNEY APPEARANCE for petitioner Phillip King by Rebecca S. Stith and Stephen Rothenberg (kec) [Entry date 05/09/97]
5/7/97	6	MOTION by petitioner Phillip King for leave to file an amended complaint (llw) [Entry date 05/09/97]
5/19/97	--	RULED DOCUMENT by Honorable Catherine D. Perry granting motion for leave to file an amended complaint [6-1] for 60 days up to 7/5/97; GRANTED, RESPONDENT SHALL RESPOND WITHIN 60 DAYS OF SERVICE OF THE AMENDED PETITION & re-setting ; response to order show cause 9/5/97 (cc: all counsel) (llw) [Entry date 05/22/97]
7/2/97	7	MOTION by petitioner Phillip King to extend time to file a first amended complaint up to and including 9/2/97

w/attachements (jwj) [Entry date 07/15/97]

7/14/97 -- RULED DOCUMENT by Honorable Catherine D. Perry granting motion to extend time to file a first amended complaint up to and including 9/2/97 [7-1] (cc: all counsel) (jwj) [Entry date 07/15/97]

9/2/97 8 FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS w/attached EXS A-G & 2 bound appendices (placed in an expandable folder) (llw) [Entry date 09/03/97]

10/28/97 9 RESPONSE to order show cause by respondent Gene Stubblefield [1-1], [0-1], [8-1], [8-2] with exhibit 1,2,3 (jwj) [Entry date 10/29/97] [Edit date 10/29/97]

11/21/97 10 MOTION by petitioner Phillip King to extend time up to and including 12/12/97 in which to file a traverse (jwj) [Entry date 11/26/97]

11/24/97 --	RULED DOCUMENT by Honorable Catherine D. Perry granting motion to extend time up to and including 12/12/97 in which to file a traverse [10-1] (cc: all counsel) (jwj) [Entry date 11/26/97]
12/10/97 11	MOTION by petitioner Phillip King to extend time up to and including 12/23/97 in which to file his traverse (jwj) [Entry date 12/17/97]
12/12/97 --	RULED DOCUMENT by Honorable Catherine D. Perry granting motion to extend time up to and including 12/23/97 in which to file his traverse [11-1] (cc: all counsel) (jwj) [Entry date 12/17/97] [Edit date 12/17/97]
12/23/97 12	TRAVERSE by petitioner Phillip King to [0-1] with attached affidavit of Paul Pruett and Thomas J. Fox (jwj) [Entry date 12/24/97]

12/23/97 13	AFFIDAVIT of Stanley Bell (FILED UNDERSEAL CDP) (jwj) [Entry date 12/24/97]
12/23/97 13	SEALED DOCUMENT by petitioner Phillip King [13-1] (jwj) [Entry date 12/24/97]
12/23/97 14	MOTION by petitioner Phillip King for leave to file affidavit under seal (jwj) [Entry date 12/24/97]
12/23/97 14	RULED DOCUMENT by Honorable Catherine D. Perry granting motion for leave to file affidavit under seal [14-1] (cc: all counsel) (jwj) [Entry date 12/24/97]
12/23/97 15	RESPONSE by respondent Gene Stubblefield to [14-1] (jwj) [Entry date 12/24/97]
12/23/97 16	REPLY by petitioner Phillip King re [14-1] with attachements (jwj) [Entry date 12/24/97]
8/19/98 17	MOTION by petitioner Phillip King to withdraw attorney Rebecca S. Stith (txc) [Entry date 08/25/98]

8/24/98	--	RULED DOCUMENT by Honorable Catherine D. Perry granting motion to withdraw attorney [17-1] attorney Rebecca S. Stith for Phillip King (cc: all counsel) [St]ephen E. Rothenberg will continue as Petitioner's counsel (txc) [Entry date 08/25/98]
2/23/00	18	MEMORANDUM AND ORDER: by Honorable Catherine D. Perry ORDERED that petitioner may, within 20 days of the date of this order, request leave to amend his petition to withdraw the claims asserted in ground 2. Failure to do so may result in the dismissal without prejudice of his petition in its entirety which may foreclose future federal habeas corpus review of his constitutional claims. (cc: all counsel) (lsd) [Entry date 02/23/00]
2/24/00	19	MOTION by petitioner Phillip King to amend first amended petition for writ, by

dismissing Claim 2 (llw) [Entry date 02/25/00]

2/25/00 20 RULED DOCUMENT by Honorable Catherine D. Perry granting motion to amend first amended petition for writ, by dismissing Claim 2 [19-1] (cc: all counsel) (txc) [Entry date 02/28/00]

4/3/00 21 MEMORANDUM AND ORDER: by Honorable Catherine D. Perry denying FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS [8-1],[8-2] FURTHER petitioner has not made a substantial showing of the denial of a constitutional right and this Court will not issue a certificate of appealability, a spearate jgm in accordance with this memorandum & order is entered this same date (cc: all counsel) (llw) [Entry date 04/03/00]

4/3/00 22 JUDGMENT: by Honorable Catherine D. Perry the

amended petition of Phillip King for writ of habeas corpus pursuant to 28:2254 is denied (cc: all counsel) (llw) [Entry date 04/03/00]

4/26/00 23 NOTICE OF APPEAL filed by petitioner Phillip King re: the District Court decision ; [22-1], [21-1] fee: $ 105.00 paid (llw) [Entry date 04/26/00]

4/26/00 24 RECEIPT # S2000-005790 in the amount of $ 105.00 for appeal fee (llw) [Entry date 04/26/00]

5/9/00 -- DELIVERED TO USCA - 1 Civil Appeal Cover Sheet, 2 Certified Copies of Notice of Appeal, 2 Certified Copies of Clerk's Docket entries and 2 copies of JUDGMENT/MEMO/ORDER (CDP) filed 4/2/00. cc:NOA to Judge Perry. cc:NOA and clerk's docket entries to parties. (blw) [Entry date 04/27/00] [Edit date 05/09/00]

5/9/00	25	ENTIRE FILE SENT TO (USCA) - # of Volumes: 1 (blw) [Entry date 04/27/00] [Edit date 05/09/00]
10/11/00	26	FILE RETURNED re appeal [23-1] 2 expansion folders doc 8, appendix to petitioner's first amended petition for writ of habeas corpus (llw) [Entry date 10/12/00]
10/16/00	27	Transmittal Acknowledgment from USCA(2 maple expansion folders doc #8-appendix to petitoner's first amended petition for writ of habeas corpus) as to defendant: Stubblefield (txc) [Entry date 10/17/00]
11/15/00	28	ORDER FROM USCA copy filed USCA number: 00-2177EMSL; This appeal comes before the court on appellant's application for a certificate of appealability. the court has carefully reviewed the original file of the district court, and the

application for a certificate of appealability is denied. the appeal is dismissed. (txc) [Entry date 11/16/00]

1/9/01 29 MANDATE W/OPINION ATTACHED from (USCA); This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed. [23-1] USCA number: 00-2177EMSL (cc: all counsel) (txc) [Entry date 01/10/01]

1/23/01 30 FILE RETURNED # of volumes; 1 and 2 expandable folders (txc) [Entry date 01/23/01]

Case Flags: TERMED
APPEAL
TRCK
4

END OF DOCKET: 4:97cv748